

BEGGING TO DEFER: LESSONS IN JUDICIAL FEDERALISM FROM COLORADO SEARCH-AND-SEIZURE JURISPRUDENCE

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INTRODUCTION

Colorado's state constitutional law of search and seizure, founded on Article II, Section 7 of the Colorado Constitution¹ as interpreted by the Colorado Supreme Court, is in disarray. In doctrine, it follows the lead of United States Supreme Court interpretations of the Fourth Amendment to the United States Constitution,² but in application it goes off leash. Although "substantially similar" in language to the Fourth Amendment, it provides broader protection from some government searches and seizures than its federal counterpart.³ In matters of doctrine, the substantial similarity of the two provisions approaches identity. Whenever the United States Supreme Court has announced a new Fourth Amendment doctrine, the Colorado Supreme Court soon thereafter has imported it into Article II, Section 7. This is true not only of Fourth Amendment doctrines widely embraced by state high courts, such as the privacy theory of the protected right⁴ and the lawfulness of investigatory stops on less than probable cause,⁵ but also of those which many states

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1. "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing." COLO. CONST. art II, § 7.

2. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

3. *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983); *People v. Haley*, 41 P.3d 666, 671 (Colo. 2001).

4. *Katz v. United States*, 389 U.S. 347, 351 (1967); *Zamora v. People*, 487 P.2d 1116, 1118 (Colo. 1971).

5. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *Stone v. People*, 485 P.2d 495, 497 (Colo. 1971).

have declined to read into their own constitutional provisions, such as the good-faith exception to the warrant requirement,⁶ the impeachment-use exception to the exclusionary rule,⁷ and the totality-of-circumstances test of hearsay information supporting probable cause.⁸ Substantial agreement in doctrine gives way, however, to substantial difference in application. Under the Colorado Constitution a taxpayer's bank records and the telephone numbers a person dials are protected from unwarranted government inspection;⁹ under the United States Constitution they are not.¹⁰ The government's installation and monitoring of a tracking beeper are subject to Article II, Section 7 scrutiny,¹¹ but they are immune from Fourth Amendment review.¹² Neither does the Fourth Amendment reach the use of trained police dogs to sniff for illegal drugs;¹³ Article II, Section 7, however, does.¹⁴

This Comment explores the reasons for the apparent tendency of the Colorado Supreme Court to defer in doctrine but differ in application. The court's own difficulty in coming to terms with this trend has become an obstacle to developing a coherent search-and-seizure jurisprudence. In the quarter-century since it first found broader state constitutional protection in *Charnes v. DiGiacomo*, the court has failed to articulate a doctrine arising organically from Article II, Section 7 that, as applied to the facts of a given case, should yield a different outcome from that which

6. *United States v. Leon*, 468 U.S. 897, 913 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 987-88 (1984); *People v. Deitchman*, 695 P.2d 1146, 1157 (Colo. 1985) (Dubofsky, J., concurring) (approving limited good-faith exception).

7. *Harris v. New York*, 401 U.S. 222, 224 (1971); *LeMasters v. People*, 678 P.2d 538, 542 (1984).

8. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

9. *Charnes v. DiGiacomo*, 612 P.2d 1117, 1120-21 (Colo. 1980) (taxpayer has standing to challenge government subpoena of bank records of taxpayer's financial transactions); *People v. Sporleder*, 666 P.2d 135, 143 (Colo. 1983) (installation of pen register, to record numbers dialed out from person's telephone, subject to warrant requirement); *People v. Corr*, 682 P.2d 20, 27-28 (Colo. 1984) (telephone toll records protected).

10. *United States v. Miller*, 425 U.S. 435, 437 (1976) (no protectable Fourth Amendment interest in depositor's bank records); *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (no protectable interest in telephone numbers dialed out); *id.* (dictum, no protectable interest in toll records; "The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not . . . make any constitutional difference.").

11. *People v. Oates*, 698 P.2d 811, 816 (Colo. 1985).

12. *United States v. Knotts*, 460 U.S. 276, 285 (1983).

13. *United States v. Place*, 462 U.S. 696, 707 (1983) (dog sniff not a search), *accord* *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), *and* *Illinois v. Caballes*, 125 S.Ct. 834, 838 (2005).

14. *People v. Unruh*, 713 P.2d 370, 377-78 (Colo. 1986) (dog sniff of locked safe); *People v. Boylan*, 854 P.2d 807, 810 (Colo. 1993) (dog sniff of sealed Federal Express package); *People v. May*, 886 P.2d 280, 282 (Colo. 1994) (dog sniff of sealed Express Mail package); *People v. Haley*, 41 P.3d 666, 672 (Colo. 2001) (dog sniff of automobile).

United States Supreme Court precedent dictates on the federal constitutional question. The starting point of Article II, Section 7 analysis is purportedly the same pair of questions—the *Katz* test—that the United States Supreme Court applies to assess Fourth Amendment claims:¹⁵ Did the person alleging an unlawful government intrusion exhibit a subjective expectation of privacy, and is society prepared to recognize that expectation as reasonable?¹⁶ In spite of this doctrinal identity, when the Colorado Supreme Court runs a particular set of facts through the two *Katz* machines—one powered by the Fourth Amendment, the other by Article II, Section 7—it sometimes obtains different results. Colorado Supreme Court Justices who have objected to extending broader protection have argued that absent significant differences in the language or history of a Colorado provision pointing to a distinctive intent, the court should defer to the United States Supreme Court’s Fourth Amendment interpretations when construing the meaning of Article II, Section 7. The majority has not openly disagreed with the dissenters; it has merely ignored them.

It is well established that a state has power “to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so”;¹⁷ that state courts have power to construe their own constitutions,¹⁸ even to interpret them as more protective against government searches and seizures than the Fourth Amendment;¹⁹ and that the United States Supreme Court will not disturb state court judgments that “rest on adequate and independent state grounds.”²⁰ In the 1970s, as the Burger Court cut back on the scope of federal constitutional protections to criminal defendants, these propositions became a rallying cry for state courts to participate in a so-called new judicial federalism

15. “Analysis of protection for the individual against governmental investigative techniques under both the state and federal constitutions begins with *Katz* . . .” *Unruh*, 713 P.2d at 377.

16. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

17. *Cooper v. California*, 386 U.S. 58, 62 (1967).

18. *Rowan v. Runnels*, 46 U.S. 134, 139 (1847) (“Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.”).

19. Unless, of course, the state itself expressly limits its own courts’ power to say what the law is. The California Constitution prohibits the courts from interpreting its provisions “to afford greater rights to criminal defendants,” including the right “to be free from unreasonable searches and seizures,” than the United States Constitution grants. CAL. CONST. art. I, § 24. The Florida Constitution’s search-and-seizure provision specifies that “[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.” FLA. CONST. art. I, § 12. For more on these “lockstep” approaches, see *infra*, Part I.

20. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

that would revive dormant civil rights provisions of the state constitutions. The Colorado Supreme Court has joined in only sparingly,²¹ vindicating its right to interpret the Colorado Constitution according to its own devices but failing to make clear what those devices are. This Comment suggests a way to remedy the defect.

Part I of the Comment provides a brief historical review of incorporation of the Fourth Amendment to apply against the states and the rise of judicial federalism through the lens of Colorado case law. Part II traces the development of independent Colorado search-and-seizure jurisprudence. It offers close readings of key cases in order to reveal how the competing institutional urges to defer to national authority and to differ from that authority have shaped the Colorado Supreme Court's decision making. Along the way, it shows that difference and deference are compatible notions that have been misunderstood by both sides in the debate as irreconcilable. Part III delves into the history of Colorado's search-and-seizure provision from the first draft of a territorial constitution in 1859 to the version adopted by the state constitutional convention of 1875-76, and develops the historical legal context in which the framers worked. Part IV throws into relief the textual differences between Article II, Section 7 and the Fourth Amendment. On the premise that different words may mean different things, it demonstrates that where a personal right of security against government intrusions is concerned, attention to differences between similar phrases may reasonably yield divergent outcomes. In conclusion, this Comment argues that these textual and historical excursions into Article II, Section 7 demonstrate an intent for the Colorado constitutional provision to stand independently—to *be* different—from the federal amendment. This mandate for independent-mindedness should embolden the court to announce forthrightly its unacknowledged doctrinal differences with the United States Supreme Court and bring clarity to its state constitutional search-and-seizure analysis.

21. In one survey of state courts cited in the state constitutional decisions of sister courts, Colorado was not among the eleven most cited state judiciaries. The three leading states were (in order) Pennsylvania, California, and New York; several smaller states ranked high, including Oregon, Louisiana, Washington, and Alaska. James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 793 (2003) (table 1).

I. FOUNDATIONS OF INDEPENDENT STATE SEARCH-AND-SEIZURE JURISPRUDENCE

The fifty state constitutions, like the United States Constitution, contain declarations, or bills, of rights. In the Colorado Constitution, those rights are declared in Article II. They include, among others, the right of religious freedom,²² of free speech and a free press,²³ the right to bear arms,²⁴ and a series of rights that attach to individuals charged with crimes, such as the right to have a speedy trial and to confront adverse witnesses²⁵—rights also accorded in the first eight amendments to the United States Constitution.²⁶ Many of those rights are described in the same or similar words in both constitutions.

Until the ratification of the federal Fourteenth Amendment in 1868,²⁷ any constitutional protection that Americans had against a state's encroachment on their liberties came from guarantees vouchsafed in that state's constitution.²⁸ The only constitutional constraint on a local constable's authority to enter a house and remove possessions was derived from state constitutional provisions concerning unreasonable searches

22. COLO. CONST. art. II, § 4.

23. *Id.* § 10.

24. *Id.* § 13.

25. *Id.* § 16.

26. Article II also contains rights found elsewhere in the United States Constitution, such as the guarantee of no *ex post facto* laws (§ 11), as well as unique rights, such as the right to freedom from imprisonment for debt (§ 12) and the guarantee that the estates of suicides shall descend or vest unimpeded (§ 9).

27. The United States Supreme Court has determined that a number of the rights set out in the first eight amendments are so basic to liberty that the states cannot deny them without offending the Fourteenth Amendment's guarantee of due process. For a concise review of the development of this doctrine of selective incorporation, including citation to the landmark cases, see *Duncan v. Louisiana*, 391 U.S. 145, 148–150 (1968) (incorporating Sixth Amendment right to jury trial). For other theories of incorporation that justices have championed, see *id.* at 163–71 (Black, J., concurring) (total incorporation); *id.* at 171–93 (Harlan, J., dissenting) (fundamental fairness).

28. In the early years of the Republic, the view that the first eight amendments to the United States Constitution applied only against the federal government was not unanimous. Plaintiffs challenging state searches and seizures were apt to cite to both the state and federal constitutions. See, e.g., *Connor v. Commonwealth*, 3 Binn. 38, 40 (Pa. 1810) (invoking search-and-seizure protections of the “sixth [sic] article of amendments to the constitution of the United States”). In 1833, the United States Supreme Court decided the question in *Barron v. Baltimore*. In explaining the Court's holding that the Fifth Amendment did not oblige the state of Maryland to pay just compensation for a taking of private property, Justice John Marshall reasoned that only those provisions of the United States Constitution that expressly addressed the states, such as the three clauses of art. I, § 10 (“No State shall . . .”), applied against them. 32 U.S. (7 Pet.) 243, 249–50.

and seizures and general warrants.²⁹ The Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment³⁰ promised some measure of federal protection against state encroachments on individual interests, but the extent of that protection and the mechanism by which it worked were the object of intense congressional debate and were unresolved at ratification. John Bingham, the principal framer of Section 1 of the amendment, argued that it "incorporated" the Bill of Rights, making their guarantees binding against the states.³¹ Others saw the amendment as primarily empowering Congress to make and enforce laws protecting the legal rights of African American citizens in the Southern states.

After ratification, the question passed to the federal courts for resolution. In *The Slaughter-House Cases* (1873) the United States Supreme Court rejected the Privileges and Immunities Clause as a source of incorporation, holding that it did not nationalize the protection of those fundamental civil rights "for the establishment and protection of which organized government is instituted."³² The question remained whether the Due Process Clause incorporated those rights or in any other sense nationalized their protection. The answer did not begin to come until 1897, when the Court determined that to satisfy due process of law as guaranteed by the Fourteenth Amendment, state and municipal governments had to make just compensation for takings—a requirement silently imported from the Fifth Amendment's Due Process Clause.³³ Thus, when Coloradoans gathered to write a state constitution in December 1875, they knew that notwithstanding the Fourteenth Amendment, their only reliable source of protection against searches and seizures by the new state government would come from the document they were about to draft.

Almost fifty years after Colorado statehood, the Colorado Supreme Court reasserted the unique authority of its state constitution's Declaration of Rights in *Massantonio v. People*. The question in *Massantonio* was whether Article II, Section 7 barred the admission of illegally seized

29. All state constitutions contain such provisions. In forty-eight states, the provision bears at least a superficial resemblance to the Fourth Amendment—that is, it speaks of security against unreasonable searches and seizures and of the conditions for a valid warrant. Two states, Arizona and Washington, entertain claims against state intrusions under a guarantee that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. II, § 8; WASH. CONST. art I, § 7.

30. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

31. See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1213 (1992) (discussion of Bingham's position).

32. 83 U.S. (16 Wall.) 36, 76 (1872).

33. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

evidence at trial.³⁴ Eleven years earlier, in *Weeks v. United States*, the United States Supreme Court had determined that the Fourth Amendment did not permit the use of such evidence to obtain convictions in federal courts.³⁵ The *Massantonio* court observed that *Weeks* and other federal cases, while persuasive, were not controlling.³⁶ “The first 10 amendments to the United States Constitution are limitations on the federal power, and not applicable to the states,” wrote the Colorado justices.³⁷ On June 8, 1925, just one week after *Massantonio* was decided, the United States Supreme Court blasted a hole in that statement when it declared, in *Gitlow v. New York*, that “freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”³⁸

In 1949, in *Wolf v. Colorado*, the United States Supreme Court acknowledged that an affirmative state law granting unbridled discretion to the police to invade people’s privacy “would run counter to the [due process] guaranty of the Fourteenth Amendment.”³⁹ The Court held, however, that the Due Process Clause did not require the states to apply the exclusionary rule.⁴⁰ Federal constitutional relief from unwarranted state intrusions came only in 1961, when the Court announced in *Mapp v. Ohio* that the Fourteenth Amendment incorporated not only the Fourth Amendment’s general right of privacy but also the specific remedy of exclusion of evidence.⁴¹

Incorporation met with strenuous opposition from some of the justices on the Warren Court. Justice Felix Frankfurter, for example, rejected incorporation doctrine as intellectually dishonest and a betrayal of federalism. He warned in 1965 that incorporation “subjects state legal processes to enveloping federal judicial authority.”⁴² The concern was that if the states were obligated to enforce the panoply of rules that the United States Supreme Court had crafted for particular provisions in the Bill of Rights, they would shy away from innovating rules to enforce

34. *Massantonio v. People*, 236 P. 1019, 1019 (Colo. 1925).

35. *Weeks v. United States*, 232 U.S. 383, 392 (1914).

36. *Massantonio*, 236 P. at 1019. Indeed, the court failed to be either controlled or persuaded, as it declined to adopt the exclusionary rule for Colorado. *Id.* at 1020.

37. *Id.* at 1019.

38. 268 U.S. 652, 666 (1925).

39. *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

40. *Id.* at 33; *Weeks v. United States*, 232 U.S. 383, 392–94 (1914) (forbidding the obtaining of convictions in federal courts by means of unlawfully seized evidence).

41. 367 U.S. 643, 655 (1961).

42. *Pointer v. Texas*, 380 U.S. 400, 409 (1965) (Frankfurter, J., concurring in result).

similar rights granted in their own constitutions, which would fall into disuse.

An oblique response to this criticism was to assure the states, as the Court did in 1967 in *Cooper v. California*, that they were free to go beyond the obligations that the incorporated federal provisions imposed on them and to grant individuals broader protections under state law.⁴³ Another response was to cut back on the scope of federal constitutional protections of the accused by carving out new exceptions to the warrant requirement and the exclusionary rule.⁴⁴ Because the number of persons who face criminal prosecution in state courts dwarfs the number of those who are brought up on federal charges, the practical impact of United States Supreme Court decisions affecting incorporated rights of defendants is keenest at the state level.⁴⁵ These diminishments of federal protections, therefore, spurred some states to reexamine their own constitutions' guarantees of personal rights.

The authority of states to interpret their own rights provisions in ways that diverge from federal interpretations of analogous incorporated provisions of the Bill of Rights derives from the principle that the United States Supreme Court will not review state court judgments that "rest on adequate and independent state grounds."⁴⁶ The keystone of this doctrine is the Reconstruction case *Murdock v. City of Memphis*, in which the Court announced that when reviewing a judgment below on a claim grounded in both federal and state law, and the federal question was de-

43. *Cooper v. California*, 386 U.S. 58, 62 (1967).

44. *Id.* at 62 (warrantless search of defendant's car at police impound lawful because reasonably related to defendant's arrest one week earlier); *United States v. Robinson*, 414 U.S. 218 (1973) (approving warrantless search incident to lawful arrest); *United States v. Watson*, 423 U.S. 411 (1976) (permitting warrantless search under exigent circumstances); *Harris v. New York*, 401 U.S. 222, 224 (1971) (trustworthy statements inadmissible against accused in prosecution's case-in-chief not barred for all purposes; trial court properly admitted, for purpose of impeaching defendant's testimony, voluntary and uncoerced statements made during custodial interrogation without benefit of *Miranda* warnings); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) (*Harris* principles apply to permit impeachment use of statements unlawfully obtained after accused, advised of right to counsel, had asked for lawyer).

45. In 1998, for example, 60,958 persons were convicted of federal offenses in U.S. district courts. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1999* (2000), 419 (table 5.21). That year, about fifteen times as many persons—927,717—were convicted of felonies in state courts. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2001* (2002), 414 (table 5.44). In 1999, felony charges were filed in 37,548 cases in Colorado state district courts. Colorado Judicial Branch, *Annual Statistical Report for Fiscal Year 2000* (s.d.) 27 (table 11). That year, 492 criminal cases were commenced in the United States District Court for the District of Colorado. U.S. Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1999* (2000), 4106 (table 5.10).

46. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

cided erroneously, it would nonetheless affirm so long as the state grounds were "sufficient to maintain" the judgment.⁴⁷

Although at the time *Cooper* was decided the power to diverge was clear, incorporation had created unforeseen procedural entanglements. These obstacles to effective divergence appeared vividly in the 1975 case *Oregon v. Hass*. The question was whether evidence elicited from a Mirandized suspect after he had asked for a lawyer was admissible at trial for impeachment purposes.⁴⁸ The United States Supreme Court found these circumstances indistinguishable from those in *Harris v. New York*, where a defendant's un-Mirandized statements were deemed admissible to impeach his testimony.⁴⁹ It therefore reversed the decision of the Oregon Supreme Court, which had concluded on federal grounds that *Harris* did not control and that the evidence was inadmissible.⁵⁰ Had the Oregon court grounded its decision in state constitutional protections, the federal issue would have been mooted. The lesson of *Hass* was that state supreme courts should not rely on federal grounds to secure personal rights but should develop their own state bill-of-rights jurisprudence. The lesson was reinforced several years later in *Michigan v. Long*, where the Supreme Court declared that in reviewing state supreme court cases involving incorporated rights, it would treat the state court's decision as if it rested solely on federal grounds unless that court "clearly and expressly" anchored its holding in the state constitution.⁵¹

Two years after *Hass*, Justice William Brennan, a champion of the 1960s expansion of federal rights, wrote an article for the *Harvard Law Review* calling on state supreme courts to tap the "font of individual liberties" within state constitutions.⁵² Brennan urged state judges, in deciding claims brought under parallel state and federal constitutional provisions, not to mechanically apply the federal interpretations of incorporated personal rights to the states' analogs. "[O]nly if they are found to be logically persuasive and well-reasoned," he declared, "may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees."⁵³ In Brennan's formulation, the state courts are barely within shouting distance when the Supreme Court announces a position on personal rights. Not only are the Court's interpretations not to be followed blindly; even when sound they do not tip the

47. 87 U.S. (20 Wall.) 590, 635 (1875).

48. *Hass*, 420 U.S. at 714-15 (1975).

49. *Id.* at 722.

50. *Id.* at 719-20.

51. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

52. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

53. *Id.* at 502.

scales and are not owed deference. The delicious phrase "logically persuasive" steals across to the states a sharper message: Do not be swayed by the cold logic of the Burger Court majority that is rolling back individual rights. Strike out on your own.

Brennan's law review article announced the dawn of the so-called new judicial federalism. Proponents promoted the state courts as laboratories for testing the wisdom and practicality of competing judicial doctrines, much as traditional federalism regards the state houses as the proving grounds of different legislative approaches to policy problems. They tended to view judicial federalism as an antidote to the "baroque structure of formulas erected by the [United States] Supreme Court" in balancing individual rights against government interests.⁵⁴ Detractors branded holdings that give broader protection on state constitutional grounds "state court activism."⁵⁵ They urged that the "poverty of state constitutional discourse," the "absence of a language suitable for debating the meaning of state constitutions," shows that individual rights are part of our national identity as Americans and have little, if anything, to do with what makes us Coloradoans or Californians or New Yorkers.⁵⁶

As litigants in civil actions and defendants in criminal proceedings learned to assert one and the same right under both the state and federal constitutions, state courts were pressed to settle a question of priority: Which to interpret first, state law or federal law? State courts that start by analyzing such claims under state constitutional law are said to take the primacy approach; only if the state constitution fails to provide protection will the federal constitutional claim be reached.⁵⁷ By contrast, state courts that first analyze a claim of protection under the United States Constitution and only move on to the analogous state constitutional claim to fill gaps in federal protection are said to take the interstitial or supplementary approach.⁵⁸ Proponents of primacy argue that this approach restores the states' historic role, before the development of federal incorporation doctrine, as a citizen's first line of defense against intrusions by state and local government agents. Advocates of the interstitial approach contend that it acknowledges a different historical truth—

54. Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 229 (1992).

55. Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

56. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 778, 836 (1992). For a response, see Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L. J. 927 (1993). For a thorough but concise review of the arguments for and against the new judicial federalism, see G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 173-89 (1998).

57. TARR, *supra* note 56, at 183-84.

58. *Id.* at 182-83.

that the states' failure to vigorously apply their own constitutional protections led the Supreme Court, in the mid-twentieth century, to extend the umbrella of incorporation to protect citizens from abuse of rights by any government within the United States.⁵⁹

Two other approaches to analogous state and federal rights grants have emerged as well. One is to declare the state constitutional right to be coextensive with the federal constitutional right as interpreted by the United States Supreme Court. The state constitutional provision would then cease to have any independent significance.⁶⁰ The final approach is typically referred to as dual sovereignty or dual reliance. Under dual sovereignty, a court is not beholden to consider the state and federal constitutional claims separately but may mix and match doctrines and precedents to assist in the analysis of a particular search-and-seizure issue. This approach has the advantage of permitting analytical flexibility but the disadvantage of risking ambiguity as to the grounds for the court's decision and exposing it, under the rule of *Michigan v Long*, to possible review and reversal by the United States Supreme Court.

Until 2005, the Colorado Supreme Court had not explicitly aligned itself with any of these four approaches. Clearly the court had no truck with the lockstep approach. Even Justice William Erickson, who wrote vigorous dissents in many of the cases in the 1980s finding broader protection under Article II, Section 7, expressed a firm conviction that "ultimately the Colorado Constitution must be interpreted by the Supreme Court of Colorado" and that United States Supreme Court interpretations "should not be followed blindly."⁶¹ Yet despite some inconsistency in applying the state constitution,⁶² the court has generally taken pains to decide search-and-seizure cases on federal constitutional grounds whenever possible.

Where the outcome of a case under Supreme Court precedents and analysis is close, however, the consequences of this preference can be disastrous. In *People v. Bertine*, the trial court granted the defendant's motion to suppress on grounds that the warrantless search of a closed backpack found during an inventory search of a van violated Article II,

59. Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717-20 (1983).

60. Texas had been a lockstep state for seventy-five years before *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998). Florida amended its constitution in 1982 to declare its search-and-seizure provision to be in lockstep with the United States Supreme Court's interpretation of the Fourth Amendment. FLA. CONST. art. I, § 12.

61. *People v. Sporleder*, 666 P.2d 135, 149 (Colo. 1983) (Erickson, J., dissenting).

62. See, e.g., *People v. Haley*, 41 P.3d 666, 679 (Colo. 2001) (Kourlis, J., dissenting) (pointing out inconsistencies in the court's holdings in cases involving narcotics dog sniffs).

Section 7.⁶³ The Colorado Supreme Court affirmed the order, but on Fourth Amendment grounds,⁶⁴ permitting the United States Supreme Court to review the decision on a writ of certiorari and, ultimately, to reverse it.⁶⁵

Despite the experience of the *Bertine* cases, in 2005 the Colorado Supreme Court expressly adopted the interstitial approach of determining whether the Fourth Amendment will vindicate the asserted privacy right and reaching the state constitutional question only if the federal claim fails.⁶⁶ Galvado was the night manager of a liquor store.⁶⁷ Police officers followed an assault suspect into the store's back room and there discovered bricks of marijuana.⁶⁸ The store's video surveillance tapes showed Galvado handling the bricks.⁶⁹ On interlocutory appeal from a suppression order, the court, by a vote of 6-1, determined that Galvado, who asserted both state and federal constitutional protections, had a reasonable expectation of privacy in the back room.⁷⁰ The court pointed out, however, "[a]s a preliminary matter," that because Galvado prevailed under its analysis of the Fourth Amendment claim, it "need not determine if the state constitution affords any greater protection."⁷¹ By formally adopting the interstitial approach in *Galvado*, the Colorado Supreme Court risks a repeat of the *Bertine* fiasco. An advantage of the approach, however, is that it may allow the court to put off indefinitely another round of dispute over the reach of broader protection under Article II, Section 7. A look at the stalemate that developed within the court over this issue between 1976 and 2001 will make clear why the court would find it attractive to forestall the day of reckoning.

II. STALEMATE OVER DEFERENCE

The Colorado Supreme Court has yet to articulate a principled, independent doctrine governing the analysis of search-and-seizure issues

63. *People v. Bertine*, 706 P.2d 411, 414 (Colo. 1985), *rev'd*, *Colorado v. Bertine*, 479 U.S. 367 (1987).

64. *Bertine*, 706 P.2d at 419.

65. *Bertine*, 479 U.S. at 376 (1987).

66. *People v. Galvado*, 103 P.3d 923, 927 (Colo. 2005).

67. *Id.* at 925.

68. *Id.* at 926.

69. *Id.*

70. *Id.* at 927.

71. *Id.* Chief Justice Mullarkey dissented but did not address whether the claim might prevail under the state constitution's broader privacy protection. *Id.* at 934. If the court is in earnest about the interstitial approach, it should be incumbent on justices who have determined that a particular state action did not violate the Fourth Amendment to analyze the case under Article II, Section 7.

under Article II, Section 7 of the Colorado Constitution. A review of the major cases where the court has expressly grounded its holding in Article II, Section 7 exposes this failing, which was first pointed out by Justice Erickson in his dissent in *People v. Sporleder* (1983) and called out again by Justice Kourlis in her dissent in *People v. Haley* (2001).

A. On the Road of Judicial Federalism

In three cases preceding *Sporleder* a unanimous Colorado Supreme Court had found broader civil rights protection under state law than the United States Constitution provided: *People v. Hoinville*,⁷² *City and County of Denver v. Nielson*,⁷³ and *Charnes v. DiGiacomo*.⁷⁴ These cases merit attention because they set the context for the dissent that erupted in *Sporleder*.

In January 1976, the United States Supreme Court issued its decision in *United States v. Watson* suggesting that the Fourth Amendment's warrant requirement applied only to searches and not to arrests.⁷⁵ Later that year, the Attorney General of Colorado relied on *Watson* to argue that evidence obtained as the result of warrantless but reasonable arrest should be admissible. In *People v. Hoinville*, the Colorado Supreme Court held that regardless of *Watson*'s doctrinal reach, officers in Colorado must obtain a warrant to make an arrest whenever there is adequate opportunity to do so.⁷⁶ The independent state grounds supporting *Hoinville*, however, were not constitutional—nowhere in its opinion does the court mention the Colorado Constitution—but statutory.⁷⁷ Thus the Colorado court did not have to go head-to-head with the United States Supreme Court over the interpretation of similar constitutional provisions. Still, *Hoinville* was an athletic first move to break loose of federal judicial orbit. The court's opinion contains a forceful restatement of the doctrine of adequate and independent state grounds as it concerns search-and-seizure law:

[U]nder our dual system of government, it is state law and not federal law that governs the legality of a state arrest so long as that law does

72. 553 P.2d 777 (Colo. 1976).

73. 572 P.2d 484 (Colo. 1977).

74. 612 P.2d 1117 (Colo. 1980).

75. 423 U.S. 411, 414–15 (1976) (warrantless arrest by postal inspector, acting in compliance with federal regulations and on reasonable suspicion but absent exigent circumstances, did not violate Fourth Amendment).

76. 553 P.2d 777, 781 (Colo. 1976).

77. *Id.* at 780–81 (construing Colorado statute directing that arrest warrant “should be obtained when practicable” to require arrest warrant absent exigent circumstances).

not violate federal constitutional protections against unreasonable searches and seizures. The states are and must be free to impose greater or additional restrictions on police conduct than are required by the federal constitution if its citizens either by their constitution or their legislature so determine.⁷⁸

The next year, the Colorado Supreme Court took another step when it relied on the state constitution to support an independent holding in a due process case. In *City and County of Denver v. Nielson* the court determined that a city ordinance outlawing the practice of massage on persons of the opposite sex violated the Colorado Constitution's due process clause.⁷⁹ In so doing, however, the Colorado court did not have to go against a Fourteenth Amendment due process doctrine announced by the United States Supreme Court. Federal precedent bearing on *Nielson* stemmed from that Court's summary dismissal of appeals in three earlier cases where state high courts had rebuffed federal due process challenges to similar anti-massage ordinances.⁸⁰ Because dismissals for want of a substantial federal question were votes on the merits and were binding on lower courts,⁸¹ the Colorado Supreme Court was obliged to regard the federal question in *Nielson* as settled. Such dismissals were not interpretations, however, and did not announce doctrine.⁸² Thus, the *Nielson* court could invalidate the Denver city ordinance on state due process grounds without having to contend with an adverse doctrinal statement issued directly or indirectly (by force of dismissals) by the United States Supreme Court.

In *Charnes v. DiGiacomo* the Colorado Supreme Court did not have that luxury. A bank depositor under investigation by the Department of Revenue moved to quash a subpoena duces tecum for the bank to produce records of his transactions.⁸³ He asserted standing to intervene on grounds that the subpoena intruded on a constitutionally protected privacy interest.⁸⁴ Four years earlier, in *United States v. Miller*, the United States Supreme Court had rejected a bank depositor's Fourth Amend-

78. *Id.* at 780 (citations omitted).

79. 572 P.2d 484, 485 (Colo. 1977); "No person shall be deprived of life, liberty or property, without due process of law." COLO. CONST. art. II, § 25.

80. *Smith v. Keator*, 419 U.S. 1043 (1974); *Rubenstein v. Township of Cherry Hill*, 417 U.S. 963 (1974); *Kisley v. City of Falls Church*, 409 U.S. 907 (1972).

81. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

82. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmances and dismissals adopt the judgment, but not necessarily the reasoning, of the court below; they "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved").

83. *Charnes v. DiGiacomo*. 612 P.2d 1117, 1119 (Colo. 1980).

84. *Id.*

ment claim, reasoning that by keeping an account with a bank, a person voluntarily reveals financial information to a third party and accepts the risk that it will be exposed to others, including the government.⁸⁵ In *DiGiacomo* the Colorado Supreme Court, acknowledging that “*Miller* limits our application of the Fourth Amendment to the facts before us,” found room in Article II, Section 7 of the state constitution to recognize and protect a bank depositor’s privacy interest.⁸⁶

The *DiGiacomo* court’s analysis of the state constitutional question was miserly and incoherent. The court began by reciting the full text of Article II, Section 7 but then never looked back on it, either to distinguish it from the Fourth Amendment or to examine any unique language in it.⁸⁷ After misframing the issue as “whether the *Katz* expectation of privacy test as a measure of unreasonable seizures [measure of protected interests?] under the Colorado Constitution gives the taxpayer here a right [standing?] to challenge a subpoena to the bank for his records,”⁸⁸ the court noted that several state courts applying *Katz* had found that depositors have a protected privacy interest.⁸⁹ Next, it summarized the California Supreme Court’s reasoning in *Burrows v. Superior Court of San Bernardino County*, which recognized as objectively reasonable a depositor’s expectation that a bank would use personal information for internal purposes only and not divulge it to the government absent legal process.⁹⁰ The court then cut to the chase, simultaneously reframing and resolving the issue: “The test we adopt to determine the taxpayer’s interest in his bank records follows *Katz* and *Burrows*: whether the bank depositor has a reasonable expectation of privacy in the bank records of his financial transactions. We conclude that the taxpayer here does.”⁹¹ This is no *Katz-Burrows* test; it is the *Katz* test engrafted with the *Burrows* conclusion. Moreover, because the Colorado court did not do the math itself, its conclusion was, well, conclusory.

It may seem unsporting to pick apart poor *DiGiacomo*, but the ragged opinion exposes problems that have dogged Colorado search-and-seizure jurisprudence ever since. First, the declaratory decision, unsupported by rigorous analysis, made it hard to tell what the case stood for aside from the narrow holding about bank records and the court’s willingness to exercise its undisputed power to construe the state constitu-

85. 425 U.S. 435, 443 (1976).

86. *DiGiacomo*, 612 P.2d at 1120.

87. *Id.*

88. *Id.*

89. *Id.* at 1120–21.

90. *Id.* at 1121; *Burrows v. Superior Court of San Bernardino County*, 529 P.2d 590, 593 (Cal. 1974).

91. *DiGiacomo*, 612 P.2d at 1121.

tion. The court embraced *Burrows* but did not derive from it a principle to apply when deciding other search-and-seizure issues under Article II, Section 7. Second, the embrace of *Burrows* did not encompass method. The California Supreme Court initially considered the claim of right under the California Constitution;⁹² having decided that state law protected the petitioner's asserted privacy interest, it expressly refrained from determining his Fourth Amendment rights.⁹³ In *DiGiacomo* the Colorado Supreme Court addressed the federal claim first. More important, it left open to doubt whether this procedure was a principled decision or solely a matter of convenience given that a United States Supreme Court precedent squarely on point obviously defeated the Fourth Amendment claim.⁹⁴ Third, the court failed to indicate what weight it gave to *Miller* as persuasive authority or, in general, what weight it would give Fourth Amendment decisions of the United States Supreme Court relative to decisions of sister state courts independently construing their own state search-and-seizure provisions. Last, by reproducing the full text of Article II, Section 7 within the body of the opinion without engaging its language, the *DiGiacomo* court succumbed to the very temptation it believed the *Miller* Court had given in to: reliance on "talismanic solutions" to constitutional problems.⁹⁵

B. *The Fork in the Road: Sporleder*

In *People v. Sporleder* the justices of the Colorado Supreme Court split over whether to find broader rights under Article II, Section 7 than the Fourth Amendment. The impetus for the split was the failure of the majority to give an adequate doctrinal reason for reaching a different result under the *Katz* test than the United States Supreme Court had under a similar fact pattern. The state constitutional question in *Sporleder* was whether a telephone subscriber has a reasonable expectation that any re-

92. *Burrows*, 529 P.2d at 592-93.

93. *Id.* at 595.

94. Convenience, as well as tactics, likely played a role for the California court, too. At the time *Burrows* was decided, there was no controlling federal precedent in California. The Fifth Circuit found a protected Fourth Amendment interest in bank records. *United States v. Miller*, 500 F.2d 751 (5th Cir. 1974), *judgment reversed*, 425 U.S. 435 (1976). But as the *Burrows* court observed, the position that the United States Supreme Court might take on the issue, in view of the justices' "varying opinions" on related questions, was "unresolved." *Burrows*, 529 P.2d at 595. Nonetheless, the *Burrows* opinion leaves no doubt that analyzing the state constitutional question first was a deliberate choice; the court did not even mention a federal claim until after it had resolved the privacy interest under state law.

95. *DiGiacomo*, 612 P.2d at 1120 n.3 (quoting *Katz v. United States*, 389 U.S. 347, 351 n.9 (1967)).

cord of the numbers she dials will remain private.⁹⁶ Mountain Bell and the Boulder District Attorney had received complaints that Diane Sporleder was making harassing phone calls.⁹⁷ A pen register—a device that captures numbers dialed but not conversations—was installed on Sporleder's home line, and a week later Mountain Bell supplied the prosecutor with the register's tape.⁹⁸ When the state filed harassment charges, Sporleder moved to suppress the evidence.⁹⁹ The trial court granted the motion specifically on the grounds that Article II, Section 7 recognized the asserted privacy interest.¹⁰⁰ The Colorado Supreme Court, over the dissent of two justices, affirmed.¹⁰¹ For the majority, the analogy of phone records to bank records, which the court had adjudged to be protected in *DiGiacomo*, was compelling and dispositive.¹⁰² Phones and banks are indispensable intermediaries in modern social and commercial life, the court reasoned; customers understand that the service provider will necessarily have access to the information they convey but actually and reasonably expect that the provider will not divulge it to outsiders.¹⁰³ A limited and necessary business transfer of personal information is "not a true disclosure to a third person"¹⁰⁴ that should expose a customer to "unrestrained police scrutiny."¹⁰⁵

Chief Justice Erickson's dissent, while contesting the majority's finding of a cognizable privacy expectation,¹⁰⁶ focused on the nature of the interest at stake.¹⁰⁷ Bank records reveal the content of financial transactions, but pen registers do not reveal the content of phone conversations.¹⁰⁸ The intrusion "into the substance of a person's economic life" when the government compels production of bank records is, according to Chief Justice Erickson, "much greater" than when telephone

96. *People v. Sporleder*, 666 P.2d 135, 136 (Colo. 1983).

97. *Id.* at 137.

98. *Id.*

99. *Id.* at 136–37.

100. *Id.* at 136.

101. *Id.* at 135.

102. *Id.* at 141 ("We believe the rationale of *DiGiacomo* applies in a comparable manner to the pen register record . . .").

103. *Id.* at 140 (on bank use), 141 (on phone use).

104. *Id.*

105. *Id.* at 142 (quoting 1 WAYNE LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.7 at 408 (1978)).

106. *Sporleder*, 666 P.2d at 146–47.

107. *Id.* at 144. All references to the *Sporleder* dissent are to Chief Justice Erickson's opinion, in which Justice Luis Rovira joined. Justice Rovira also wrote separately, *id.* at 151 (joined by Erickson, C.J.) to object to the court's decision to apply the exclusionary rule retroactively.

108. *Id.* at 147.

numbers are divulged.¹⁰⁹ Because the information contained in the numbers alone is "relative[ly] innocuous," the intrusion of a pen register is "insubstantial."¹¹⁰ In short, only content merits protection, and phone numbers are not content.

The puzzle of *Sporleder* is how two members of the unanimous *DiGiacomo* court came, three years later, to rail against the merits of a case that was—forgive the expression—substantially similar to *DiGiacomo*. Some of the arguments urged in the *Sporleder* dissent should have cut equally against protecting a customer's bank records. For example, with respect to the effects of deregulation: "The many changes in the business practices of public and private entities engaged in the transfer of information undercut claims that a legitimate and reasonable expectation of privacy exists as to the information relinquished when"—when transferring funds? No, when "dialing a telephone."¹¹¹ Likewise, arguments that the dissent acknowledged as persuasive in *DiGiacomo* should have persuaded in *Sporleder*. Chief Justice Erickson wrote, "We emphasized [in *DiGiacomo*] that the substance of the bank records sought was a protected interest, not the fact that there may or may not have been a financial transaction."¹¹² The substance of the phone records that the state sought to use in prosecuting Diane Sporleder for harassment was not the fact that there may or may not have been phone calls; it was the numbers dialed.

For Chief Justice Erickson, the more profound question that the majority opinion raised was under what circumstances the Colorado Supreme Court should interpret Article II, Section 7 of the Colorado Constitution to confer broader search-and-seizure protection than the United States Supreme Court has found that the Fourth Amendment provides. In his view, divergence from Fourth Amendment precedent is merited only if the court can show unique language or history of Article II, Section 7 that demonstrates a distinct interpretive intent. In *Smith v. Maryland*, the United States Supreme Court had determined that the installation and use of a pen register did not constitute a Fourth Amendment search.¹¹³ In its analysis, the *Smith* Court had devotedly followed the

109. *Id.*

110. *Id.* at 146.

111. *Id.* Deregulation of the banking industry had already begun when *DiGiacomo* was decided in June 1980. Earlier that spring, President Jimmy Carter had signed into law the Depository Institutions Deregulation and Monetary Control Act of 1980, which lifted ceilings on the interest rate payable on accounts and permitted banks to compete with thrifts. 94 Stat. 132 (Mar. 31, 1980).

112. *Sporleder*, 666 P.2d at 147.

113. *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

principles of *Katz*¹¹⁴—the same test that the *DiGiacomo* opinion had acknowledged was “applied in Colorado courts to reasonably limit governmental searches and seizures.”¹¹⁵ The *Sporleder* majority conceded, citing to *Katz*, that the Fourth Amendment and Article II, Section 7 share a common purpose¹¹⁶ and did not appeal to any distinctive characteristics of Article II, Section 7 to support its holding. Given the substantially similar language of the two constitutional provisions¹¹⁷ and the common premises from which the two courts analyze search-and-seizure issues, the Colorado Supreme Court should “approach the [*Smith*] decision . . . with deference.”¹¹⁸ Deference requires that “[l]ower courts . . . explain their divergences from the interpretation of higher appellate courts in reaching different conclusions.”¹¹⁹ Adequate explanation would consist in either demonstrating “an intent on the part of Colorado’s framers opposite to that of the framers of the Federal Constitution”¹²⁰ or fully exposing “the faultiness of [the United States Supreme Court’s] interpretation of the United States Constitution.”¹²¹ In Chief Justice Erickson’s view, the majority had done neither.

The dissent’s formalist objections to recourse to the state constitution in *Sporleder* have their roots in the four trouble spots of the *DiGiacomo* decision: (1) failure to integrate Article II, Section 7 into the analysis, (2) failure to articulate an independent principle guiding Colorado search-and-seizure protection, (3) failure to identify the trigger for independent state analysis, and (4) failure to determine the weight to be accorded United States Supreme Court decisions that control the Fourth Amendment analysis. As to the first issue, the *Sporleder* court repeated its practice of displaying the text of Article II, Section 7 in full but giving it no role in the analysis.¹²² It may well be that state courts are not obliged to ground their differences from Fourth Amendment doctrine in any distinctive state constitutional language. The North Carolina Supreme Court, for example, has asserted that in deciding claims brought under the North Carolina Constitution’s Declaration of Rights, “[e]ven were the [state and federal] provisions identical, we have the authority to construe our own constitution differently from the construction by the

114. *Id.* at 739 (calling *Katz* “our lodestar”).

115. *Charnes v. DiGiacomo*. 612 P.2d 1117, 1120 (Colo. 1980).

116. *Sporleder*, 666 P.2d at 139.

117. *Id.* at 140 (“substantially similar”) (Quinn, J.), 149 (“substantially the same”) (Erickson, C.J., dissenting).

118. *Id.* at 149.

119. *Id.*

120. *Id.*

121. *Id.* at 150.

122. *Id.* at 139.

United States Supreme Court of the Federal Constitution.”¹²³ But reproducing the provision in the opinion without pointing to any unique language that extends broader protection could only be a goad to textualists to respond.

As to the second issue, the *Sporleder* majority proclaimed that they were following *Katz* but had actually modified the doctrine to produce a different result. The court declared: “As in the case of the Fourth Amendment to the United States Constitution, *see Katz* . . . , the purpose of the Colorado constitutional provision is protect a person’s legitimate expectation of privacy from unreasonable governmental intrusions.”¹²⁴ This “purpose” conflates two ideas from *Katz*: Justice Stewart’s principle of protecting people, not places, from government intrusion and Justice Harlan’s two-prong test of privacy expectations, which made no mention of government.¹²⁵ The *Sporleder* court may have drawn its formula from dicta in one of the first post-*Katz* Fourth Amendment cases, *Mancusi v. DeForte*.¹²⁶ In *Mancusi*, Justice Harlan stated that *Katz* shifted the analysis of Fourth Amendment claims from a property-interest basis to whether there was “a reasonable expectation of freedom from governmental intrusion.”¹²⁷ Within a short time, some state courts seized on this phrase as announcing a theory of targeted privacy—that the proper inquiry centered not on general privacy expectations but on expectations that the government would keep out.¹²⁸ That theory matches what the *Sporleder* court actually said *DiGiacomo* stood for: disclosure of personal information to a service provider for a limited purpose is “not true disclosure to a third person such as would vitiate the [customer’s] reasonable expectation of privacy” in that information.¹²⁹ But even in *Sporleder*, four years after *DiGiacomo*, the court seemed un-

123. *State v. Carter*, 370 S.E.2d 553, 555 (N.C. 1988) (declining to extend good-faith exception to warrant requirement), *accord* *State v. Jackson*, 503 S.E.2d 101, 103 (N.C. 1998) (citing United States Supreme Court interpretations of Sixth Amendment as persuasive authority in support of own interpretation of state constitution’s Confrontation Clause).

124. *Sporleder*, 666 P.2d at 139.

125. *Katz v. United States*, 389 U.S. 347, 351 (Stewart, J.), 361 (Harlan, J., concurring) (1967).

126. *Mancusi v. DeForte*, 392 U.S. 364 (1968) (holding that union employee had reasonable expectation of privacy in union workplace). Well before the Colorado Supreme Court decided *Sporleder*, however, the United States Supreme Court had repudiated *Mancusi*’s version of *Katz*. In *Rakas v. Illinois*, the Court observed that *Mancusi* made “barely any mention of the threshold substantive question of whether the search violated DeForte’s own Fourth Amendment rights.” 439 U.S. 128, 139 n.7 (1978).

127. *Mancusi* 392 U.S. at 368.

128. *See, e.g., State v. Matias*, 451 P.2d 257, 260 (Haw. 1969); *Commonwealth v. McCloskey*, 272 A.2d 271, 273 (Pa. 1970).

129. *Sporleder*, 666 P.2d at 140.

ready or unwilling to say outright that its doctrine was no longer aligned with *Katz*.

As to what triggers an independent analysis on state constitutional grounds, the procedural posture of *Sporleder* mooted the inquiry. Because the trial court had granted Diane Sporleder's motion to suppress evidence explicitly on grounds that the government had violated her rights under Article II, Section 7,¹³⁰ the Colorado Supreme Court was beholden to take up the state constitutional question on interlocutory appeal. Nonetheless, the *Sporleder* majority did spill a lot of ink over *Smith v. Maryland*, the Fourth Amendment precedent on pen registers. It thus begged the fourth question: How much weight should United States Supreme Court precedent be given, as persuasive authority, in deciding Article II, Section 7 issues? The *Sporleder* majority was in a no-win situation. For its analysis of the privacy expectation it relied primarily on Justice Thurgood Marshall's *Smith* dissent, citing to it repeatedly and quoting it for the central proposition that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all."¹³¹ The Colorado Supreme Court seemed to regard the views of a United States Supreme Court justice on Fourth Amendment doctrine as having special relevance to interpreting the state constitution's search-and-seizure provision. If it had addressed the question of weight directly, it would have had to explain why a dissenting analysis, joined by only one other justice, should be given effect over the decisive analysis of five justices.¹³²

Because the *Sporleder* majority failed to answer the core questions that its continued expansion of search-and-seizure rights raised, it left the court without a compass to navigate a course through future cases asserting broader rights under Article II, Section 7 than the Fourth Amendment afforded. The dissent offered up its own answers, suggesting that before striking out independently, the court should take direction from some unique history, text, or intent behind the Colorado provision. Not a footnote in the court's opinion so much as acknowledged the dissenters' concerns.

In the repertoire of landmark cases in judicial federalism, *Sporleder* is a tragedy. It achieved an incremental expansion of privacy protection at inordinate expense. To lose Chief Justice Erickson's vote on the im-

130. *Id.* at 136.

131. *Id.* at 141 (quoting *Smith v. Maryland*, 442 U.S. 735, 749 (Marshall, J., dissenting) (1979)).

132. Justice Marshall's dissent was joined by Justice Brennan. *Smith*, 442 U.S. at 748. Justice Stewart also dissented but wrote a separate opinion, also joined by Justice Brennan. *Id.* at 746. Justice Powell took no part in the decision. *Id.* The Court's opinion was delivered by Justice Blackmun. *Id.* at 736.

mediate controversy over government use of pen registers was one thing; to allow his doubts about the wisdom of independent state adjudication of fundamental rights to go unassuaged was another. As an associate justice, he had been a champion of state sovereignty and privacy rights. Three years before *Sporleder*, he had written the court's opinion in *Nielson* finding a state constitutional due process violation. As to personal rights, in the early 1970s he had resisted the court's expansion of the power it had granted in *Stone v. People*¹³³ for the police to detain suspects on less than probable cause.¹³⁴ The price of a victory on phone numbers was the perhaps-needless splintering of the court on the larger issue of independent state constitutional protections.

C. *The Decline after Sporleder*

The split that *Sporleder* exposed on the Colorado Supreme Court over independent state constitutional grounds persisted, despite additions to the list of government actions that escape Fourth Amendment scrutiny but intrude on legitimate privacy interests under Article II, Section 7.¹³⁵ Notwithstanding reference to a "broader definition" of legitimate privacy expectations under the Colorado Constitution,¹³⁶ no such definition is explicitly articulated in the majority opinions, which elicited dissents similar to Justice Erickson's in *Sporleder*.

In the 1990s, the court stopped adding to the list and began to cut back on the practical effect of its broader-protection holdings. Bank and telephone records remained protected, but the court exempted them from the warrant requirement, permitting prosecutors to compel their production by means of a subpoena duces tecum.¹³⁷ On the strength of the court's 1986 decision that the sniff of a locked safe by a narcotics-detecting police dog was a limited search requiring reasonable suspicion,¹³⁸ trial judges started relying on Article II, Section 7 as grounds to suppress evidence discovered by police dog sniffs conducted under various circumstances. On three occasions, the Colorado Supreme Court heard appeals from such suppression orders; in all three instances the court found that the dog sniff in question was a search but reversed the

133. 485 P.2d 495 (Colo. 1971).

134. *People v. Gurule*, 488 P.2d 889 (Colo. 1971); *People v. Stevens*, 517 P.2d 1336, 1343 (Colo. 1973).

135. *People v. Corr*, 682 P.2d 20, 27 (Colo. 1984) (access to toll records of long-distance telephone calls); *People v. Oates*, 698 P.2d 811, 818 (Colo. 1985) (installation of tracing beeper in moveable goods).

136. *Oates*, 698 P.2d at 815.

137. *People v. Mason*, 989 P.2d 757, 758 (Colo. 1999).

138. *People v. Unruh*, 713 P.2d 370, 377-78 (Colo. 1986).

orders, having found that the searches were supported by reasonable suspicion.¹³⁹ When the court at last, in 2001, upheld orders suppressing evidence from the dog sniff search of a car's exterior, it elicited a familiar-sounding dissent: "The majority here declines to follow the United States Supreme Court's analysis of the Fourth Amendment and instead reads the Colorado Constitution as providing protection that would not be available under the Fourth Amendment. I disagree that there is a basis for that expansion."¹⁴⁰ Once again, the dissent called on the majority to base divergence on historical and textual intent.¹⁴¹ The distance between Justice Rebecca Love Kourlis's dissent in *People v. Haley* and Chief Justice Erickson's dissent is eighteen years in time and only a stone's throw in distance.

The following parts of this Comment provide the historical and textual evidence that proponents of independent state analysis of search-and-seizure could draw on to satisfy the demands of dissenters since *Sporleder*. The history of the drafting of Article II, Section 7 and the textual differences between that provision and the Fourth Amendment amply demonstrate that the intention of the framers of Colorado's Declaration of Rights was for the Colorado courts to determine the scope of privacy protection independently of the United States Supreme Court's interpretations of federally conferred rights.

III. THE HISTORY OF THE CREATION OF ARTICLE II, SECTION 7

Article II, Section 7 of the Colorado Constitution has remained unchanged from the form in which it was submitted to the Committee of the Whole at the state constitutional convention in the winter of 1875–76. The section says:

The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized,

139. *People v. Wieser*, 796 P.2d 982, 988 (Colo. 1986) (suppression order reversed) (Mullarkey, J. concurring in judgment) (dog sniff of storage locker was minimally intrusive search justified by reasonable suspicion of illegal drugs); *id.* at 992 (Quinn, J., dissenting) (dog sniff was limited search unsupported by reasonable suspicion); *People v. Boylan*, 854 P.2d 807, 810 (Colo. 1993); *People v. May*, 886 P.2d 280, 282 (Colo. 1994).

140. *People v. Haley*, 41 P.3d 666, 679 (Colo. 2001) (Kourlis, J., dissenting).

141. *Id.*

as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.¹⁴²

This language did not arise in a historical vacuum but emerged as the last of several search-and-seizure provisions proposed for Colorado as early as 1864.

The history of Colorado search-and-seizure provisions is bound up in the history of the territory. Before 1861, the land that was to become Colorado was part of the Kansas, Nebraska, New Mexico, and Utah territories.¹⁴³ In August 1858, news of gold strikes near Pike's Peak and along the Front Range brought an influx of white settlers and created support for establishing a separate territorial government.¹⁴⁴ In January 1859, Alexander H. Stephens of Georgia introduced a bill in the House of Representatives to form a "Territory of Jefferson."¹⁴⁵ The bill never came to a vote,¹⁴⁶ but among the immigrants the name stuck: a call went out for delegates to meet in convention to "push forward . . . the formation of the State of Jefferson."¹⁴⁷ The convention met in the summer of 1859 and produced a state constitution, but it was defeated at the polls in favor of territorial status.¹⁴⁸ In October, a second convention produced a constitution, this time for Jefferson Territory.¹⁴⁹ Both Jefferson constitutions contained a search-and-seizure provision that closely tracks the phrasing of the federal Fourth Amendment.¹⁵⁰

142. COLO. CONST. art. II, § 7.

143. 1 JEROME C. SMILEY ET AL., SEMI-CENTENNIAL HISTORY OF THE STATE OF COLORADO 221 (1913) [hereinafter HISTORY OF COLORADO]; 1 COLORADO AND ITS PEOPLE 199 (LeRoy R. Hafen ed., 1948).

144. 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 199-200.

145. *Id.* at 200.

146. *Id.*

147. ROCKY MTN. NEWS, May 7, 1859, *quoted in* 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 205.

148. 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 206-7.

149. *Id.* at 208.

150. "The right of the people to be secure in their persons houses papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause supported by oath or affirmation particularly describing the place to be searched and the persons and things to be seized." CONST. OF THE STATE OF JEFFERSON art. 1, § 18 (autographed copy signed by William H. Byers, chairman of the drafting committee), *microformed on* Records of the States of the United States of America (Libr. of Cong., 1949) [hereinafter Records of the States]. Byers had first written "on public cause" but crossed out "public" and corrected it to "probable." The provision in the October territorial constitution is almost identical except in its final phrase, ". . . and the matters to be seized" (emphasis added). 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 18 (William F. Swindler ed., 1973) [hereinafter 2 SOURCES AND DOCUMENTS], *citing* ROCKY MTN. NEWS, October 20, 1859. The origin of this change is obscure. No other state or territorial constitution says "matters." The Jefferson constitutions were modeled on the Iowa Constitution of 1857. *See* DONALD WAYNE HENSEL, A HISTORY OF THE COLORADO CONSTITUTION IN THE

Congress organized the Colorado Territory in 1861 and three years later passed an enabling act to make the territory into a state.¹⁵¹ Proponents of statehood, meeting in convention in 1864, drafted a Colorado constitution,¹⁵² but it was rejected at the ballot box by a three-to-one margin.¹⁵³ The convention was reconvened in 1865 and produced another constitution, which was approved at the polls by a margin of 155 votes, out of nearly 6000 cast.¹⁵⁴ The search-and-seizure provisions of the 1864 and 1865 constitutions are identical.¹⁵⁵

The search-and-seizure text of the 1864 constitution, unlike the Jefferson text, broke with the Fourth Amendment on several points. The litany "persons, houses, papers and effects" became "persons and property"; the amendment's final word, "things," gave way to "property"; "shall not be violated" became "shall be inviolate"; and the oath or affirmation was to be made by "one or more witnesses."¹⁵⁶ The changes to "property" and "inviolate" betray the influence of Kansas's 1859 Wyandotte Constitution, which incorporated those innovations.¹⁵⁷ They may also reflect the delegates' anxiety, in the wake of the Colorado gold rush,

NINETEENTH CENTURY 26, 384 (1957). The Jefferson security provision bears the Iowa earmarks: "seizures and searches" (instead of "searches and seizures") and "affirmation particularly describing" (instead of "affirmation, and particularly describing").

151. Act of Feb. 28, 1861, 36th Cong., 12 Stat. 172 (1861); Act of Mar. 21, 1864, 38th Cong., 13 Stat. 32 (1864).

152. Constitution and Ordinances of the State of Colorado, Adopted in Convention July 11, 1864 [hereinafter 1864 Constitution], *microformed on* Records of the States, *supra* note 150.

153. 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 298–99. Support for statehood was almost entirely in Arapahoe County (Denver). The opposition came from many quarters: concern that Colorado's population was large enough to bear the financial burden of self-governance; worry among Hispanic Coloradans about Anglo domination; and dismay that the proposed constitution denied suffrage to African-Americans. HISTORY OF COLORADO, *supra* note 143, at 472.

154. 2 SOURCES AND DOCUMENTS, *supra* note 150, at 28; 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 299. It has been suggested that while post-Civil War optimism about economic and population growth accounted for some gain in the yes vote, the slim victory was owed to ballot tampering. HISTORY OF COLORADO, *supra* note 143, at 474.

155. Compare 1864 Constitution art. 1, § 16, *supra* note 152, with State Constitution as Adopted by the Constitutional Convention, Aug. 12, 1865, Bill of Rights, § 16, *microformed on* Records of the States, *supra* note 150.

156. "The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation of one or more witnesses, particularly describing the place to be searched, and the persons or property to be seized." 1864 Constitution, *supra* note 150, art. 1, § 16. One copy of the 1864 text, published four days before the Constitution's adoption by the convention, calls for "two or more witnesses." ROCKY MTN. DAILY NEWS, July 7, 1864, *microformed on* Records of the States, *supra* note 150.

157. KAN. CONST., Bill of Rights, § 15. See also HENSEL, *supra* note 150, at 65, 392. The Kansas Constitution is the only state constitution to use the phrase "shall be inviolate."

to preserve their claims to land and to the water and mineral rights on and under the surface.¹⁵⁸

In 1866, Congress voted to admit Colorado as a state, but President Andrew Johnson vetoed the bill, on grounds that the territory's population was too small to provide an adequate tax base to support a state government.¹⁵⁹ A rapid increase in population in the early 1870s revived the statehood movement.¹⁶⁰ In March 1875, Congress passed a new enabling act,¹⁶¹ and President Ulysses S. Grant signed it into law.¹⁶² Delegates to a state convention, meeting in Denver from December 20, 1875, to March 15, 1876, produced a new constitution, which voters approved at a special election on July 1, 1876.¹⁶³

Evidence suggests that in the months leading up to the convention at least some Coloradoans were taking an intense interest in the form that the new constitution would give to personal rights. Sometime in 1875 an innovative draft of a constitution for Colorado was published in Denver by a "committee of citizens of Colorado."¹⁶⁴ This draft called for a unique governmental structure: the state would have no governor, and executive duties would be carried out by the "chief judicial magistrate."¹⁶⁵ The various proposals were aimed at curtailing the economic waste and official corruption which, the "committee" believed, plagued state governments. The draft's Declaration of Rights revamped many of the traditional American rights guarantees, including protection against unlawful warrants. That provision read, "No warrant for the arrest of any person or for the searching of any place shall issue, except upon the testimony of some person shewing that some crime has probably been committed, and setting forth the nature of the supposed crime, the person to be arrested and the place to be searched."¹⁶⁶ Because nothing is known about the "committee" that created this draft, or about the re-

158. Article XIV, § 10 prohibits the legislature from passing laws that would "divest the right of property acquired by persons or corporations . . . while its territorial limits were known as Kansas or Jefferson. . . ." Another indicator of this anxiety is the miners' courts and claim clubs that sprang up, beginning in 1859, to settle disputed claims and discourage claim jumping. See Barbara Bintliff, *A Jurisdictional History of the Colorado Courts*, 65 U. COLO. L. REV. 577, 580-83 (1994); 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 210-16.

159. Veto Message of May 15, 1866, in 2 SOURCES AND DOCUMENTS, *supra* note 150, at 50-53.

160. 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 343.

161. Act of Mar. 3, 1875, 43d Cong., 18 Stat. 474 (1875).

162. 1 COLORADO AND ITS PEOPLE, *supra* note 143, at 343.

163. *Id.* at 345-47, 355.

164. Draft of a Constitution Published under the Direction of a Committee of Citizens of Colorado, for Consideration and Discussion by the Citizens of the Centennial State (1875), *microformed on Records of the States*, *supra* note 150.

165. *Id.*

166. *Id.* art. 5, ¶ 4.

sponse (if any) that it received from Coloradoans, it would be overreaching to assume that it distilled the will of any sizable faction of the citizenry. Nonetheless, in its readiness to stray far from the search-and-seizure templates of the Fourth Amendment and then-existing state constitutions, this draft provision displays two remarkable characteristics. First, it explodes legalistic abstractions like "probable cause" and assembles the pieces into phrases a layperson might understand, such as "shewing that some crime has probably been committed." Second, it explicitly relates warrants to crime. In contrast, the history of the Fourth Amendment, as Professor Amar observed, "is not uniquely bound up with criminal law."¹⁶⁷

When the constitutional convention convened in December 1875, it assigned to a standing committee the task of drafting a bill of rights.¹⁶⁸ The published proceedings of the convention contain no record of the committee's meetings or of any floor debate over the wording of the search-and-seizure provision. Already on January 8, 1876, when the standing committee reported out a first draft of the bill of rights, the search-and-seizure provision was in its final form.¹⁶⁹ When the standing committee presented a revised Article II to the Committee of the Whole for final discussion and approval on February 1, delegates proposed changes and made corrections to several rights provisions,¹⁷⁰ but not Section 7.¹⁷¹

The text of Article II, Section 7 follows almost verbatim the language of the search-and-seizure provision in the Missouri Constitution of 1875.¹⁷² Less than a year old, the Missouri Constitution was the state of

167. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994).

168. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875 TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO 24-25 (1907).

169. *Id.* at 89 ("majority report" of standing committee on bill of rights). It was announced that a minority report would be forthcoming, but it never made it to the convention floor. *Id.* at 92, 124.

170. For example, Section 6, on judicial process, was amended to afford injured parties a "speedy" remedy, instead of a "certain" remedy, and to correct a typographical error; a motion was made to amend Section 8 to allow routine felony charges to be brought by information as well as indictment, but was defeated. *Id.* at 202-03.

171. The sum total of remarks in the proceedings is, "Mr. James moved the adoption of section 7 as reported by the Committee of the Whole, which was agreed to. So the Convention adopted section 7 as reported by the Committee of the Whole." *Id.* at 202.

172. MO. CONST. of 1875, art. II, § 11. The only difference in wording is "nearly" instead of "near." In 1921 Ebenezer T. Wells, who served as a justice on the territorial supreme court from 1871 to 1875 and was a delegate to the convention, told an interviewer that delegates to the 1876 constitutional convention relied primarily on the Illinois and Missouri constitutions. HENSEL, *supra* note 150, at 220 (citing *Interview with E. T. Wells*, ROCKY MTN. NEWS, Sept. 17, 1921).

the art in state constitution drafting. The Colorado delegates relied heavily on it, as well as the Illinois Constitution of 1870, particularly in crafting the articles on the structure, powers, and financing of state legislatures and local governments.¹⁷³ Many of Colorado's rights provisions—freedom of speech and press, freedom of elections, defendants' rights in criminal prosecutions, in addition to security against unreasonable searches and seizures—track the corresponding provisions in the Missouri Constitution. Given that search-and-seizure jurisprudence in Missouri was sparse and unremarkable—the few pertinent appellate decisions before 1875 did not rest on the distinctive phrasing of the state constitutional provision¹⁷⁴—it seems likely that Colorado's search-and-seizure provision was not specially imported from Missouri but was shipped in bulk, along with other uncontroversial provisions.

That observation, however, does not end the inquiry, urged by some modern Colorado justices, into the framers' intent.¹⁷⁵ The search-and-seizure provision Colorado took from Missouri included an innovation: the requirement that the oath or affirmation be "reduced to writing." The provision Missouri adopted in 1875 is the same as the one that appeared in Missouri's first constitution in 1820, except for that single phrase. If the Colorado framers had not wanted it, they could have stricken it, much as they struck particular phrases from other imported provisions. The Missouri free-speech grant read, in part, "That no law shall be passed impairing the freedom of speech, *no matter by what means communicated*: that every person shall be free to say, write or publish, *or otherwise communicate* whatever he will on any subject . . ."¹⁷⁶ The Colorado

173. In 1893, Chief Justice Charles D. Hayt observed that Colorado's search-and-seizure provision "is almost identical" to Illinois' and so proceeded to treat Illinois case law as persuasive authority in its interpretation. *Lustig v. People*, 32 P. 275 (Colo. 1893) (holding that misdemeanor may be tried only on sworn written information). Hayt was wrong; the Illinois provision closely tracked the Fourth Amendment. Hayt's error is perplexing and intriguing, given the clear influence of the 1870 Illinois Constitution on legislative and judicial reform provisions of the Colorado Constitution. Many of the delegates had migrated to Colorado from Illinois, including a member of the bill of rights standing committee, Daniel Hurd. Notes, Denver Public Library catalog entry for Daniel Hurd, Scrapbook, at <http://catalog.denver.lib.co.us> (last visited January 23, 2005). Henry Bromwell, a political mover at the Colorado convention, had represented an Illinois district for two terms in Congress and had been a delegate to the 1870 Illinois constitutional convention. Biographical directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000865> (last visited January 23, 2005).

174. No pre-1875 search-and-seizure decision quotes the Missouri Constitution. In one case, the defendant urged the court to declare that the state constitution prohibited warrantless arrests, but the court rested its holding on common law. *Roberts v. State*, 14 Mo. 138, 145 (1851) (warrantless arrests are not per se illegal).

175. *People v. Sporleder*, 666 P.2d 135, 149 (Colo. 1983) (Erickson, J., dissenting); *People v. Haley*, 41 P.3d 666, 680 (Colo. 2001) (Kourlis, J., dissenting).

176. MO. CONST. art. 1, § 8 (emphasis added).

framers ditched the catch-alls (*italicized*) but kept the rest of this portion of the provision.¹⁷⁷ Moreover, if they were concerned in the several grants of personal rights not to tie the state's hands too tightly (as the Missouri free-speech catch-alls might have seemed to do), they could have lopped off the writing requirement from the end of the warrant clause.

Thus, the choice of form and phrasing of Article II, Section 7, when considered in the context of the other provisions in the Declaration of Rights that the Colorado constitutional convention adopted, cannot be discarded as mere happenstance. While it cannot be certain what specific intention motivated a particular choice, the evidence indicates that the drafters chose deliberately. That their choices are consequential becomes clearer upon close examination of the words they selected.

IV. TEXT AND THE MEANING OF DIFFERENCE

*These are amazing: each
Joining a neighbor, as though speech
Were a still performance. . . .*

*. . . you and I
Are suddenly what the trees try
To tell us we are:
That their merely being there
Means something . . .*

—JOHN ASHBERY, *SOME TREES* (1956)

Let's start with the words. Article II, Section 7 of the Colorado Constitution says:

[T]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation, reduced to writing.¹⁷⁸

177. COLO. CONST. art. II, § 10. Actually, there was one other change: "free to say" became "free to speak."

178. COLO. CONST. art. II, § 7.

The Fourth Amendment of the United States Constitution says:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁷⁹

Plainly, these two unwieldy sentences are similar. On many occasions the Colorado Supreme Court has refined that observation by opining that they are "substantially similar."¹⁸⁰ This additional insight assumes that what is similar is the substance—all the substance.

To see that two things are similar is to see also that they are different. Minute differences in word choice, word order, conjunction, and punctuation can have substantial consequences. This lesson has not been lost on Fourth Amendment scholars, who have pored over every difference between the draft amendment that James Madison sponsored in 1789 in the House of Representatives¹⁸¹ and the final text that became the Fourth Amendment—notwithstanding their substantial similarity—in the hope of clarifying ambiguities of intent and meaning.¹⁸² The text of the Colorado Constitution's Article II, Section 7 deserves like scrutiny.

Highlighting the differences between the state and federal provisions by overlaying the text of Article II, Section 7 on that of the Fourth Amendment may be of help. In the merged texts below, words, letters, and punctuation found only in the Fourth Amendment and not in the Colorado provision are struck through; those present in the Colorado provision alone are underlined. The one phrase that occurs in both texts but shifts position has been bracketed.

179. U.S. CONST. amend. IV.

180. See, e.g., *People v. Haley*, 41 P.3d 666, 671 (Colo. 2001); *People v. Cagle*, 751 P.2d 614, 617 n.3 (Colo. 1988); *Sporleder*, 666 P.2d at 140; see also *Lustig v. People*, 32 P. 275 (Colo. 1893) ("substantially the same").

181. Madison's version read:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

1 ANNALS OF CONG. 434-35 (Joseph Gales ed., 1834), quoted in NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100 n.77 (1937).

182. See generally Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 551 (1988).

The ~~right of the people shall to~~ be secure in their persons, ~~houses,~~ papers, ~~homes~~ and effects, ~~against from~~ unreasonable searches and seizures ~~shall not be violated,;~~ and no warrant ~~to search any place or seize any person or things~~ shall issue, ~~but upon <probable cause, supported by oath or affirmation>, and particularly without~~ describing the place to be searched, ~~and or~~ the persons or things to be seized, ~~as near as may be, nor without <probable cause, supported by oath or affirmation>~~ reduced to writing.

This part of the Comment will examine five points of textual difference: the structure of the unreasonableness clauses; the words “homes” and “houses”; the position of “papers” among the things to be secured; the writing requirement; and the nearness and particularity clauses.¹⁸³ Scrutiny of these points will demonstrate the fertility of close reading of real textual differences within their historical context.

A. “*The people shall be secure . . .*” / “*The right of the people to be secure . . .*”

Do the two unreasonableness clauses do the same work? Formally, the Colorado provision describes a *right* of the people to be secure, whereas the federal provision describes an *obligation* of the government to respect that right. On this account, Article II, Section 7 confers or recognizes a broad right of personal security in places and things, whereas the Fourth Amendment demarcates the state’s obligation to respect an established, closely drawn right covering only one’s person, one’s house, one’s papers, and one’s effects.¹⁸⁴

183. This is not to say that attention to other differences would not be profitable. The repetition of the warrant definition, for example, is a tempting object for further investigation. Article II, Section 7 of the Colorado Constitution, unlike the Fourth Amendment, gives the warrant definition twice: “no warrant to search any place . . .” and “without describing the place to be searched . . .” If the first instance were deleted and the second preserved, would there be any doubt what kind of warrant was meant? If not, is this an empty legalistic redundancy? (Most of the Colorado framers were, after all, lawyers.) Or is dwelling on the definition intended to carry rhetorical force, perhaps to emphasize its importance? In Jewish law, a repetition announces the fundamental duty of judges—“Justice, justice shall you pursue” (*tsedek, tsedek tirdof*), Deut. 16:20—and a considerable exegetical literature has developed to explain it. In classical rhetoric, the device is known as *communitatio*, literally “dwelling” to amplify a point. Of course, classical rhetoric also recognizes as vices long-windedness and mind-numbing repetition. See, e.g., “Macrolugia” and “Tautologia,” in *SILVA RHETORICAE: THE FOREST OF RHETORIC* (Gideon Burton ed.), available at <http://rhetoric.byu.edu/default.htm> (last visited April 14, 2005).

184. See *Weeks v. United States*, 232 U.S. 383, 391 (1914) (describing the purpose of Fourth Amendment is to put government on notice of limitations and restraints on its power and authority).

The functional semantic distinction comes into focus in the first words of the Fourth Amendment. The qualification of "right" by the definite article "the" points to an intent to protect a known and limited range of privacy, not all privacy. As Justice Potter Stewart wrote in the Court's opinion in *Katz*, "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' [It] protects individual privacy against certain kinds of governmental intrusion . . ." ¹⁸⁵ This implication of the definite article is well developed in free-speech jurisprudence. As Justice John Paul Stevens observed concerning the First Amendment's prohibition against laws abridging *the* freedom of speech, "the definite article suggests that the draftsmen intended to immunize a previously identified category or subset of speech." ¹⁸⁶

This reading of the Fourth Amendment right accords with the theory announced in *Katz*, in which the Court held that electronic audio surveillance of a public telephone booth is a Fourth Amendment search. ¹⁸⁷ Writing for the Court, Justice Stewart famously observed that "the Fourth Amendment protects people, not places." ¹⁸⁸ This maxim, even when taken at face value, hardly promises a net gain in protection. It should go without saying that the Fourth Amendment protects people *in* places—in their persons, houses, papers, and effects—and that the right to be secure belongs to the people, not the places. Justice Stewart's conflation, muddying two of the few syntactically clear propositions in the Fourth Amendment, puts the Fourth Amendment status of places up for grabs. If the amendment does not care (or care much) about places, can people count on protection anywhere? Justice Stewart's next sentence confirmed that they cannot: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." ¹⁸⁹ The two-prong test that Justice Harlan announced in his concurring opinion—subjective expectation of privacy and objective reasonableness of that expectation—is a means of drawing a line around that Fourth Amendment right. Whether by the privacy-

185. *Katz v. United States*, 389 U.S. 347, 350 (1967).

186. Hon. John Paul Stevens, *The Freedom of Speech*, Address at the Inaugural Ralph Gregory Elliot First Amendment Lecture at Yale Law School (Oct. 27, 1992), in 102 YALE L.J. 1293, 1296 (1993).

187. *Katz*, 389 U.S. at 353.

188. *Id.* at 351.

189. *Id.* Two years after *Katz*, true to the principle that Fourth Amendment rights do not inhere in places, Justice Stewart joined in objecting to allowing a homeowner to challenge the government's use of third-party conversations illegally recorded on his premises in his absence. *Alderman v. United States*, 394 U.S. 165, 192 (1969) (Harlan, J., dissenting in part) ("[G]ranting property owners standing does not permit them to vindicate intrusions upon their *own* privacy, but simply permits criminal defendants to intrude into the private lives of others.").

based *Katz* rule or the property-based rule (trespass doctrine) that *Katz* replaced, the government needs a clear understanding of the scope and limits of "[t]he right . . . to be secure" so as to comply with the amendment's prime directive: Do not violate this right.

Moreover, this express directive provides an incentive for government to construe the right narrowly so as to maximize compliance and limit the risk of a violation. *Katz* and its progeny do not say otherwise. Just because the *Katz* Court, having tossed aside the trespass doctrine, recognized that electronic audio surveillance of a public telephone booth is a Fourth Amendment search¹⁹⁰ does not mean the *Katz* principle test per se broadens the Fourth Amendment right or that in a close decision validating a search the Court has misapplied *Katz*.

The distinction is not trivial; it underlies the long-standing debate within the federal judiciary over whether reasonableness or probable cause is the gold standard for evaluating searches and seizures.¹⁹¹ Yet none of the thirteen states whose search-and-seizure provisions begin with "The people shall be secure . . ." has relied on that phrase in any decision extending privacy protection beyond the limits set by the United States Supreme Court for the Fourth Amendment.¹⁹²

B. "... homes . . ." / "... houses . . ."

Are "houses" and "homes" the same places? Proverbially, of course, a house is not a home. The proverb was refreshed for American readers in 1845 by the Transcendentalist and early feminist writer Margaret Fuller, who professed, "A house is no home unless it contain food and fire for the mind as well as for the body."¹⁹³ Fuller, championing

190. *Katz*, 389 U.S. at 353.

191. Consider, in this light, Justice Miller's dissent in *Boyd v. United States*: "While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power." 116 U.S. 616, 641 (1886) (Miller, J., dissenting).

192. Those states are Alabama, Colorado, Connecticut, Delaware, Kentucky, Maine, Mississippi, Missouri, Montana, New Mexico, Pennsylvania, Tennessee, and Texas. Two other states' provisions have a similar syntactic structure—Louisiana, LA. CONST., art. I, § 5 ("Every person shall be secure . . .") and Michigan, MICH. CONST., art. I, § 11 ("The person, houses, papers and possessions of every person shall be secure . . ."). Their jurisprudence, likewise, has made nothing of the difference.

193. MARGARET FULLER, *WOMAN IN THE NINETEENTH CENTURY* 36 (Arthur B. Fuller ed., W.W. Norton & Co. 1971) (1855). Fuller's *WOMAN* was first published in 1845 by Horace Greeley, the newspaper editor whose reports from the Colorado gold fields in 1859 spurred Anglo settlement of the territory and who encouraged the founding, in northern Colorado in 1870, of the utopian community that took his name. Greeley helped promote the 1855 edition of Fuller's book by contributing an introduction, which also appeared in an edition

women's education and self-improvement, was playing on another adage: A woman's place is in the *home*. In contrast, the slogan that came to stand for the common-law principle of security against state intrusions was that a *man's house* is his castle. American courts dragged it out for display ad nauseam in search-and-seizure opinions, tracing it back variously to *The Semayne's Case*¹⁹⁴ and James Otis's 1761 oration against writs of assistance in *Paxton's Case*.¹⁹⁵

By the end of the nineteenth century, the sharp line between the house as the man's domain and the home as the woman's was beginning to blur. A Westlaw search of all federal and state cases before 1945 (database ALLCASES-OLD) for the phrase "house is his castle" yielded 151 hits; almost a third (fifty hits) were from the nineteenth century, the earliest being from 1809.¹⁹⁶ A search of the same Westlaw database for "home is his castle" yielded only thirty-six hits, all but one of them from the twentieth century; the outlier was from 1893.¹⁹⁷ Since 1945, "home" has made up most of the gap: the same searches run without date restriction (database ALLCASES) turned up 241 "home" cases and 267 "house" cases. This word substitution may indicate a cultural psychic shift reflected, in constitutional law, in reimagining the Fourth Amendment as protecting a privacy right (in homes) instead of a property right (in houses).

Is there any place called a home in which the Colorado Constitution should keep a person secure but the United States Constitution should not? In *People v. Avery*, a case that might have turned on a substantive distinction between *house* and *home*, the Colorado Supreme Court highlighted this difference in constitutional wording as a preliminary matter but never returned to it in the analysis or holding.¹⁹⁸ One might likewise ask whether there is a place called a house where a person would be secure from "unwarranted" intrusions by federal agents but not by local police officers. But under the current version of the incorporation doctrine, the question is academic, for when a state search-and-seizure provision is

published in 1874, a year before the Colorado constitutional convention.

194. *Semayne v. Gresham*, 77 Eng. Rep. 194, 198 (K.B. 1604) ("The house of every one is his castle.").

195. The Speech of James Otis (1761), as reported to Otis's biographer by John Adams, in WILLIAM TUDOR, LIFE OF JAMES OTIS 66-67 (1823) and 2 THE WORKS OF JOHN ADAMS 524 (1850) ("A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."); see, e.g., *Irvine v. California*, 347 U.S. 128, 150 n.1 (1954) (Douglas, J., dissenting) (citing TUDOR); *State v. Smith*, 1 N.H. 346 (1818) (citing *Semayne*, *supra* note 194).

196. *Widgery v. Haskell*, 5 Mass. (1 Tyng) 144 (1809).

197. *Haggart v. Stehlin*, 35 N.E. 997 (Ind. 1893).

198. 478 P.2d 310, 311 (1970) (invalidating for lack of particularity search warrant naming address but no room number, where building appeared to be single-family residence but had been converted to rooming house).

less protective than the Fourth Amendment, it falls through the federal floor.

C. "... papers, homes ..." / "... houses, papers ..."

Under the Colorado Constitution, papers have pride of place before homes. It should not be assumed that this ordering is happenstance. At the time the state constitution was being drafted, the privacy of certain papers—business records—was under attack by the United States Congress, and the federal courts were being called upon to determine the validity of such congressional action under the Fourth Amendment.

In 1875, the United States Attorney for the Eastern District of Wisconsin filed informations to seize three tons of coal and an undisclosed quantity of liquor from their owners, "distillers and rectifiers," for having worked frauds on the revenue.¹⁹⁹ He issued subpoenas for their business records, under authority of an 1874 revision of the customs code permitting federal prosecutors, in noncriminal cases, to subpoena any book, invoice, or paper tending to prove that a person had not complied with the customs laws and given the government its cut.²⁰⁰ The targets of this investigation contested the subpoenas on grounds that the 1874 act infringed on their Fifth Amendment right against self-incrimination and Fourth Amendment protection against unreasonable and warrantless government seizures.²⁰¹

The government won. The court held that the Fifth Amendment right did not attach because the action was civil, in rem against property (coal and liquor), not a criminal proceeding,²⁰² and that the Fourth Amendment protects papers only when they implicate their owner in a felony.²⁰³ The court also considered whether allowing the government to subpoena business records was "obnoxious" to the spirit of the Fourth Amendment, and determined that it was not. "This is not an attempt to unreasonably search the private affairs of the citizen. The books and papers called for pertain to the business in which the government, as a supervising power, has an interest, and concerning the conduct of which, as affecting the public revenues, the government is prosecuting the pending proceedings."²⁰⁴

199. *United States v. Three Tons of Coal*, 28 F. Cas. 149, 150 (E.D. Wis. 1875) (No. 16,515).

200. Act of June 22, 1874, Ch. 391, § 5, 18 Stat. 186, *quoted in Three Tons of Coal*, 28 F. Cas. at 150.

201. *Three Tons of Coal*, 28 F. Cas. at 150.

202. *Id.* at 153–54.

203. *Id.* at 151–52.

204. *Id.* at 158.

Three Tons of Coal was one of the last in a series of federal cases²⁰⁵ upholding congressional statutes aimed at getting access to the books of businesses that the government suspected of skirting the revenue laws. An 1867 act had empowered judges to issue warrants authorizing the United States Marshall to enter premises to seize business records.²⁰⁶ The 1874 revision at issue in *Three Tons of Coal* knocked out those direct, physical intrusions, with their unfortunate potential for violence, and replaced them with subpoenas compelling persons to bring the government what it wanted. At the same time, it took cover from Fourth Amendment attack by creating the legal fiction that the person complying with the subpoena would merely be permitting the government to inspect the subpoenaed papers and would not relinquish custody of them.²⁰⁷ But in case its cover was blown, the act placed in front of prosecutors warrant-like formal and procedural hurdles to obtaining subpoenas: judicial scrutiny, particular description of the papers, and a recital of how the papers will tend to prove the allegations (probable cause).²⁰⁸

These revenue acts were the Stamp Acts of the Reconstruction era. They empowered federal agents to confiscate papers and extort revenue to fill the treasury in remote Washington—and to pay the same federal judges who issued the subpoenas. Worse yet, in requesting a subpoena the prosecutor did not have to take an oath. For Coloradoans in 1875, this would not have been a trivial defect.²⁰⁹ The freedom-of-religion provision adopted in the 1876 constitution admonishes that “the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations.”²¹⁰ In this light, the Colorado constitutional convention’s adoption of Missouri’s innovative requirement that warrant oaths be reduced to writing seems intentional. It affirmed a high value that, at the federal level, was being diminished.

205. See *United States v. Mason*, 26 F. Cas. 1189 (D.C.N.D. Ill. 1875) (No. 15,735); *United States v. Hughes*, 26 F. Cas. 417 (C.C.S.D. N.Y. 1875) (No. 15,417); *In re Platt*, 19 F. Cas. 815 (D.C.N.Y. 1874) (No. 11,212); *Stockwell v. United States*, 23 F. Cas. 116 (C.C. Me. 1870) (No. 13,466); *United States v. Distillery No. 28*, 25 F. Cas. 868 (D.C. Ind. 1870) (No. 14,966). These cases were all cited in, and had their holdings rejected by, the Supreme Court in *Boyd v. United States*, 116 U.S. 616 (1886), which invalidated a similar revenue act.

206. Act of Mar. 2, 1867, ch. 188, § 2, 14 Stat. 547.

207. Act of June 22, 1874, ch. 391, § 5, 18 Stat. 186.

208. *Id.*

209. Apparently, this is not so for modern-day Coloradans, according to the Colorado Supreme Court. See *People v. Mason*, 989 P.2d 757, 760–61 (Colo. 1999) (approving subpoena duces tecum functioning as quasi-warrant).

210. COLO. CONST. art. 2, § 4. The oath clause, like the rest of Colorado’s religious-freedom provision, was lifted from Illinois’ constitution (1870), not Missouri’s. Idaho is the only other state that has it.

The federal attack on business papers may also have been on the mind of the state convention's bill of rights committee when they put "papers" before "homes" in the reasonableness clause. The effect of the change in word order is not to weaken the core protection of the home but to elevate the status of a type of property that the federal courts were treating as second-class.

D. "... reduced to writing"

The writing requirement—that probable cause be "supported by oath or affirmation reduced to writing"—is the one directive of Article II, Section 7 that has no analog in the Fourth Amendment. It is also the one phrase in the state provision that, since incorporation under *Mapp*, Colorado justices have regularly spotlighted, not only as creating a unique practical hurdle to obtaining a valid warrant, but as reserving for Coloradoans a degree of heightened protection against government intrusion.

In *Hernandez v. People*, the Colorado Supreme Court's first major search-and-seizure case after *Mapp*, Justice Pringle highlighted the phrase in observing that "[t]he Colorado Constitution, Article II, Sec. 7, is even more restrictive [than the Fourth Amendment] and provides that probable cause must be supported by oath or affirmation *reduced to writing*."²¹¹ This was bald dictum. The Fourth Amendment supplied more than enough power to nullify the three warrants in question, which had been issued upon boilerplate affidavits empty of facts and circumstances to support the officer's conclusions.²¹² The case was so easy that the Attorney General, in light of *Mapp*, had confessed prejudicial error: it would hardly have been possible to convict Hernandez of theft by receiving if the trial judge had excluded the stolen dictating machine that an officer had illegally seized from the trunk of Hernandez's car.²¹³ For the state supreme court, the *Hernandez* opinion was all about flexing its muscles—both at local law enforcement, to put them on notice that the pre-*Mapp* free ride was over, and at the United States Supreme Court, which by incorporating the Fourth Amendment might be seen as grabbing disused power from complacent state judiciaries.²¹⁴ "In our view,"

211. *Hernandez v. People*, 385 P.2d 996, 999 (1963) (emphasis in original).

212. *Id.* at 999–1000.

213. *Id.* at 997.

214. A Columbia University law professor and future United States District Court judge observed, in a lecture he gave in Boulder in 1961, that although Colorado had plenty of search-and-seizure regulations on the books, the police had been "free to ignore even the slight limitations they provide[d]" and the case law interpreting them was "virtually nonexistent." Jack R. Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MOUNTAIN L. REV. 150, 157 (1962). The last national decennial digest to appear before *Wolf*

Justice Pringle wrote for the Colorado court, "*Mapp* . . . does not by its terms nationalize the law of search and seizure, but it does compel state courts to examine and resolve the problems arising from the search for and the seizure of evidence in the light of state and federal constitutional guarantees against unlawful searches and seizures."²¹⁵

The fate of the writing requirement since *Hernandez*, from its pinnacle of authority in 1970 to its gradual decline beginning the following year, is a study in the fickle interplay of state and federal search-and-seizure law. In *People v. Baird*, the court made it clear, again in an opinion by Justice Pringle, that "reduced to writing" meant that in determining whether to issue a warrant, the only place a magistrate might look for indicia that a tip was reliable and an informant credible was within the four corners of the affidavit.²¹⁶ By contrast, the *Aguilar* test—which, at the time, was the Fourth Amendment standard for evaluating hearsay evidence offered to support probable cause—required that the magistrate merely be "informed of" underlying circumstances going to credibility and reliability.²¹⁷

And yet from the *Baird* peak of the reduced-to-writing doctrine one can already see the way down. The *Baird* court applied the federal *Aguilar* test to determine whether the affidavit supported a finding of probable cause; it did not treat the question as a matter of first impression under state constitutional law.²¹⁸ This move had the virtue of efficiency. The United States Supreme Court already had developed a test; if the warrant failed that test, the defendant's claim would prevail (by incorporation of the Fourth Amendment through the Fourteenth Amendment) and the case would be over. This is the practical advantage, in such circumstances, of the interstitial approach discussed above in Part I. The trade-off is that even if formally the state court couches such a move as an exercise of one sovereign's discretion to adopt another sovereign's

v. People, 187 P.2d 926 (Colo. 1947), which nominally incorporated the Fourth Amendment, does not cite one Colorado case in ninety-six pages of search-and-seizure headnotes. 39 FIFTH DECENNIAL DIGEST 1936–1946, at 1435–1528 (1949). The last digest to appear before *Mapp v. Ohio*, 367 U.S. 643 (1961), however, does cite one: *Wolf v. People*. 27 SIXTH DECENNIAL DIGEST 1946–1956, at 127 (1958). Even nine years after *Mapp*, the Colorado Supreme Court was determining as a matter of first impression such a basic question as the test for sufficient specificity of description in warrants. See *infra* note 227 and accompanying text.

215. *Hernandez*, 385 P.2d at 998 (internal citations omitted).

216. *People v. Baird*, 470 P.2d 20, 22 (Colo.1970).

217. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), cited with approval in *Spinelli v. United States*, 393 U.S. 410, 412–13 (1969), overruled by *Illinois v. Gates*, 462 U.S. 213 (1983). On this proposition, the *Aguilar* court cited Justice Pringle's *Hernandez* opinion. 378 U.S. at 144 n.5.

218. *Baird*, 470 P.2d at 22–23.

rule, the impression remains that federal precedent ruled the state court's decision making.

On this reading, *Baird*, rather than establishing Colorado's writing requirement as solid ground on which to stand against the nationalization of search-and-seizure law, revealed it to be a narrow ledge from which state court independence was hanging. From this perspective, the court's failure to mention *Spinelli v. United States*, the case that refined the *Aguilar* test, seems an act of desperation. Although technically there was no need for the *Baird* court to invoke *Spinelli*—the affidavit in controversy was so sketchy that the court easily invalidated it—still, the absence of any reference to that case is glaring.

The oversight would not last long. The next year, in *People v. Brethauer*,²¹⁹ the court applied the full *Aguilar-Spinelli* test. Although on its surface *Brethauer*, which invalidated a warrant issued on an affidavit much more detailed than that in *Baird*, is a victory for defendants' rights, the close dependence of its analysis on federal doctrine and precedent marked a retreat from independent development of Article II, Section 7 based on the writing requirement. In dicta, the court opined that a magistrate could bring an insufficient affidavit up to snuff by taking sworn testimony from the affiant, then reducing the testimony to writing and incorporating it into the affidavit by reference. The court's opinion in *Brethauer* was written by Justice Erickson, who later became the leading voice on the court favoring high deference to the United States Supreme Court on interpretations of constitutional privacy rights.

The potency of the writing requirement was further diminished in 1985 when the Colorado Supreme Court, in *People v. Deitchman*,²²⁰ skirted the question of whether the good-faith exception to the exclusionary rule, which the Fourth Amendment permitted,²²¹ offended the state constitution. The trial judge, relying on a Colorado statute prohibiting the suppression of competent evidence seized as a result of an officer's "good faith mistake,"²²² had admitted evidence obtained pursuant to a warrant supported by an affidavit that failed to link the defendant to the named address.²²³ In a per curiam opinion, the Colorado Supreme Court affirmed Deitchman's conviction on grounds that any error was harmless, but the justices failed to agree on whether the judge had erred and, if

219. 482 P.2d 369 (Colo. 1971).

220. 695 P.2d 1146 (Colo. 1985).

221. *United States v. Leon*, 468 U.S. 897, 913 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88 (1984).

222. 1981 Colo. Sess. Laws 922 (codified as amended at COLO. REV. STAT. § 16-3-308 (2005)).

223. *Deitchman*, 695 P.2d at 1148.

so, how.²²⁴ Justice William D. Neighbors found a state constitutional violation, which he grounded in the writing requirement of Article II, Section 7 and in the court's declaration in *Baird* that the facts supporting probable cause "must appear on the face of the written affidavit."²²⁵ No members of the court joined in Justice Neighbors's concurrence. Two justices found the statute inapplicable and, much to Justice Neighbors's consternation,²²⁶ did not reach the state constitutional question.²²⁷

In the past ten years, the writing requirement, once the font of the notion of heightened protection under the Colorado provision, has continued to be marginalized. The state Supreme Court upheld the use of subpoenas duces tecum as quasi-warrants so long as the enabling statute provides "procedural safeguards" against their abuse—safeguards that do not have to include an oath or affirmation reduced to writing.²²⁸ In *People v. Gall*, the court in effect gave magistrates permission to repair a bad affidavit with parts borrowed from a bad warrant.²²⁹ Given the court's recent reticence to fully credit even the explicit writing requirement, it is small wonder that subtler but no less substantive peculiarities of the language of Article II, Section 7 have escaped notice.

E. "describing . . . as near as may be" / "describing particularly"

The Colorado Constitution requires warrants to describe the place to be searched and things to be seized "as near as may be." Colorado is one of eight states whose constitutions' search-and-seizure provisions include a nearness requirement.²³⁰ The United States Constitution and the majority of state constitutions require warrants to describe "particularly."

224. *Id.*

225. *Deitchman*, 695 P.2d at 1172 (quoting *People v. Baird*, 470 P.2d 20, 22 (Colo. 1970)).

226. *Id.* at 1169 (lamenting "the court's readiness to resort to gyrating federal search and seizure doctrines . . . rather than to independently interpret" Article II, Section 7).

227. *Id.* at 1157 (Dubofsky, J., joined by Lohr, J., concurring). The statute expressly forgave an officer's reasonable mistake "of facts" but not of law and therefore did not, on its face, take in reliance on a defective warrant. COLO. REV. STAT. § 16-3-308(2)(a) (1984 Supp.); see *Deitchman*, 695 P.2d at 1167-68 (Quinn, J., concurring). Justices Quinn and Neighbors agreed that the statute did not apply but focused their opinions elsewhere—Justice Neighbors on the state constitutional question, Justice Quinn on the federal question. *Id.* at 1166 (Quinn, J., concurring) (*Leon* exception to federal exclusionary rule not available because officer's reliance on warrant was objectively unreasonable). Immediately after *Deitchman* appeared, the legislature amended the statute to read "of facts and law . . ." 1985 Colo. Sess. Laws 615.

228. *People v. Mason*, 989 P.2d 757, 760-61 (Colo. 1999).

229. *People v. Gall*, 30 P.3d 145, 151 (Colo. 2001). This point is also recognized in Justice Martinez's dissent. *Id.* at 158.

230. The other seven states are Alabama, Connecticut, Kentucky, Missouri, Pennsylvania, Rhode Island, and Texas. In those states, the phrase has "nearly" instead of "near."

“Near” and “particular” are not substantially similar in meaning. The substance of nearness is proximity and similarity; the substance of particularity is detail and difference. Nearness goes to the relation of the object to the description; particularity has to do with the object’s relation to other places, persons, and things.

The basis for treating “as near as may be” and “particularly” as similar is that they serve the same purpose as the warrant clause’s other requirements (oath and probable cause): to prevent the issuance of general warrants. In developing rules for testing the sufficiency of warrant descriptions, courts have tended to focus on the final cause and all but to ignore the material cause—the words of the constitutional text.

The touchstone of Fourth Amendment particularity doctrine has been the following passage from the Prohibition-era case *Marron v. United States*:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.²³¹

In *Marron*, federal agents executing a warrant to search a speakeasy for liquor and stills also seized the owner’s business ledgers.²³² The issue before the Court was whether to carve out an exception for seizures incident to execution of a valid search warrant, much as the law permitted warrantless searches incident to lawful arrest.²³³ The Court’s inquiry, therefore, centered on whether such an exception would be consonant with the purposes of the Fourth Amendment. There was no question that the warrant did not describe particularly the papers that the revenueurs had seized, for it had not described them at all.

The Colorado Supreme Court has just enough history with the nearness clause to tease. Although the court has never directly interpreted “as near as may be,” let alone independently grounded a decision on the clause, for two terms Justice Robert B. Lee showed a special interest in it. In 1970 and 1971, Justice Lee wrote opinions in three cases challenging warrants as defective because of insufficient descriptions. In the first, *People v. Schmidt*, he announced the court’s holding:

The constitutional language “particularly describing the thing to be

231. *Marron v. United States*, 275 U.S. 192, 196 (1927).

232. *Id.* at 193–94.

233. *Id.* at 194–95.

seized" or "as near as may be" should be given a reasonable interpretation commensurate with the type of property sought to be seized so that the officer charged with the duty of executing the warrant will be advised with a reasonable degree of certainty of the property to be seized.²³⁴

Although for practical purposes the opinion lumps the state and federal phrases together, it matters that they are kept formally separate. Nearness never falls by the wayside, muscled off the road by Fourth Amendment particularity.²³⁵ The two phrases receive the same interpretation, but there is no claim that they *mean* the same thing or that one phrase subsumes the other.²³⁶

In his next two opinions on the sufficiency of warrant descriptions, Lee struck out a bit farther. Both cases concerned the sufficiency of war-

234. *People v. Schmidt*, 473 P.2d 698, 700 (Colo. 1970) (citing *North v. State*, 32 So.2d 915 (Fla. 1947) and *State v. Nejin*, 74 So. 103 (La. 1917)). The court did not cite a single Colorado precedent on the sufficiency of descriptions; there was none to cite. See Weinstein, *supra* note 214, at 157. The "reasonable degree of certainty" test that the court adopted is friendlier to state agents than the test long applied next door in Oklahoma—that from the warrant's description alone, unaided by other information, the officer should be able to recognize the place or thing. *Burns v. State*, 220 P.2d 473, 475 (Okla. Crim. App. 1950); cf. *Smart v. State*, 73 P.2d 488, 489 (Okla. Crim. App. 1937) ("[T]he complaint or affidavit must particularly describe the place to be searched, . . . with such reasonable particularity that no discretion . . . is left to the searching officer."). *Schmidt* does not mention the Oklahoma test.

235. Compare recent Colorado Supreme Court synopses of the state and federal constitutional provisions. For example, "the Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution prohibit the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized." *People v. Miller*, 75 P.3d 1108, 1112 (Colo. 2003) (citing U.S. CONST. amend. IV; COLO. CONST. art. 2, § 7; COLO. REV. STAT. § 16-3-303 (2002) (specifying the requirements for a search warrant)); see also *People v. Hebert*, 46 P.3d 473, 483 (Colo. 2002). Ironically, the section of the Colorado Code of Criminal Procedure that the *Miller* court cites requires that a supporting affidavit allege "facts sufficient to: (a) Identify or describe, *as nearly as may be*, the premises, person, place, or thing to be searched; (b) Identify or describe, *as nearly as may be*, the property to be searched for, seized, or inspected . . ." COLO. REV. STAT. § 16-3-303 (2004) (emphasis added). *Miller's* passing reference to the state constitution is pro forma; the holding is squarely on Fourth Amendment grounds alone. 75 P.3d at 1117 (information in affidavit supporting probable cause must be current because link between place to be searched and existence of contraband in that location "is at the heart of Fourth Amendment protections.").

236. The court does quote the United States Supreme Court for the "guideline of construction" that "[t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *Schmidt*, 473 P.2d at 700 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). The "area" to which *Ventresca* referred, however, was not particular description in warrants but probable cause on the face of affidavits "normally drafted by nonlawyers in the midst and haste of a criminal investigation." *Ventresca*, 380 U.S. at 108. Notably, the *Schmidt* court did not make the standard cite to *Marron v. United States* for the black letter on Fourth Amendment particularity with respect to seizures. *Supra*, n. 231.

rants that failed to specify the apartment to be searched in a multi-unit building. In *People v. Avery*, the court held that a warrant stating the building's address was invalid unless it identified by number or tenant's name the unit to be searched.²³⁷ Writing for a unanimous court, Justice Lee called attention to the pertinent differences in wording of the federal and state constitutions: "Immediately apparent from a reading of these constitutional provisions are the requirements that the house or home to be searched must be particularly described *or* described as near as may be."²³⁸ His analysis, however, did not refer to any distinction in meaning, and in support of the court's holding he recited the general agreement of federal and state judicial authorities that such a warrant was "insufficient to meet the constitutional requirements of particularity of description."²³⁹ The next year, in *People v. Maes*, the court limited *Avery* by holding that a supporting affidavit which sufficiently identifies a unit may fill the gap in a deficient warrant.²⁴⁰ In dissent, Justice Lee wrote that *Maes* "does violence to the unequivocal mandate of both the federal and state constitutions—that the warrant 'particularly describe the place to be searched' *and* that it describe the place 'as near as may be.'"²⁴¹ His switch from the disjunctive "or" in *Avery* to the conjunctive "and" in *Maes* suggests a move from viewing particularity and nearness as interchangeable to seeing them as complementary, each approaching the object of the search from a slightly different angle. *Maes* turned out to be Justice Lee's final word on the subject; the court did not hear another warrant-description case in his remaining eleven years on the bench.

Colorado is one of eight states to have a nearness clause, and the courts in some of the other seven states have been more receptive to exploring its nuances.²⁴² While those courts have come to various conclusions about the significance of their nearness clause as against the federal particularity requirement,²⁴³ they all have understood that the difference

237. *People v. Avery*, 478 P.2d 310, 312 (Colo. 1970).

238. *Id.* at 311 (emphasis added).

239. *Id.* at 312.

240. *People v. Maes*, 491 P.2d 59, 61 (Colo. 1971).

241. *Id.* at 62 (emphasis added).

242. The seven states, in addition to Colorado, are Alabama, Connecticut, Kentucky, Missouri, Pennsylvania, Rhode Island, and Texas. The Mississippi Constitution of 1817, whose Declaration of Rights Connecticut copied into its own constitution the following year, included a nearness clause. Art. I, § 9. However, in the state's Reconstruction-era Constitution, the wording changed to "specially designating." MISS. CONST., art. I, § 14, *repealed by* MISS. CONST., art. III, § 23.

243. Kentucky's supreme court was the first to call attention to the nearness clause, when it found that the state's warrant provision "does not require a description of the place to be searched, in the same language, or so explicitly as is required by the constitution of the United

means *something*. Not only do different words have different meanings; not only may substantially similar words have significant differences in meaning; but difference itself has meaning.

CONCLUSION

From *Sporleder* to *Haley*, dissenters from Colorado Supreme Court opinions extending broader rights against government intrusions under Article II, Section 7 than the United States Supreme Court has found in the Fourth Amendment have called on the majority to ground its analysis in unique textual or historical features of the state constitutional provision. The majority has generally avoided responding to these calls. The substantial differences in the language of the two constitutional texts and in the particular historical circumstances of their adoption demonstrate a clear intention on the part of the framers of the Colorado Constitution that Article II, Section 7 have a life of its own, independent of the Fourth Amendment. The court should therefore be as bold in announcing the real differences between Article II, Section 7 doctrine and Fourth Amendment doctrine that underpin the specific broader protections of the Colorado provision.

The *Katz* privacy-interest principle that the United States Supreme Court has elaborated is not the same principle that the Colorado Supreme Court has been following in interpreting Article II, Section 7. The holdings in the line of Colorado cases on privacy of bank and telephone records and on the government's use of intrusive investigative techniques

States" *Reed v. Rice*, 25 Ky. (2 J.J. Marsh.) 44, 45 (1829) (warrant mandating seizure of stolen slaves "if they be found in . . . John M. Rice's possession" was not invalid for want of description of place to be searched). In modern times, the Pennsylvania Supreme Court declared that the nearness language "is more stringent than that of the Fourth Amendment, which merely requires particularity in the description." *Commonwealth v. Grossman*, 555 A.2d 896, 899 (Pa. 1989). A Connecticut justice noted in a special concurrence to an 1896 decision that Connecticut's phrasing is "somewhat more precise and explicit than that of the fourth amendment." *State v. Griswold*, 34 A. 1046, 1049 (Conn. 1896) (Baldwin, J., concurring in result). The most illuminating cases arose in Connecticut and Rhode Island in the 1850s after those states passed draconian temperance statutes (patterned after the so-called Maine Law of 1851) shutting down saloons and requiring judges to issue search warrants for contraband liquor on the complaint of three voting citizens of good moral character. JOHN ALLEN KROUT, *THE ORIGINS OF PROHIBITION* 295 (1925). Among the many grounds on which such searches and seizures were challenged was the sufficiency of description within warrants. In one such case, the Rhode Island Supreme Court held that "[Rhode Island's] constitutional provision supposes that it would not be possible particularly to describe in all cases, and therefore contents itself with providing for a description as near as may be—i.e., as near as the circumstances will admit. . . ." *State v. Snow*, 3 R.I. 64, 69 (1854). The Connecticut Supreme Court determined that "as nearly as may be" required that warrants make the place to be searched "distinguishable from all other places." *Gray v. Davis*, 27 Conn. 447, 456 (1858).

such as tracing beepers and dog sniffs derive from the target theory of reasonable expectations of privacy—a doctrine that measures not a generalized expectation of privacy against all comers but a specific expectation that the government will not have access to personal information without good reason. This is the “broader definition of what constitutes a legitimate expectation of privacy” to which the court has adverted as recently as this year²⁴⁴ but shied away from stating in so many words. To announce it forthrightly would not be to deny the common purposes of the state and federal privacy guarantees. It would, in fact, be a greater show of respect to the United States Supreme Court to acknowledge this doctrinal difference than to continue the pretense that the state and federal doctrines are aligned in *Katz*. Moreover, in future cases presenting an issue under Article II, Section 7, it would permit the justices of the Colorado Supreme Court to engage in a constructive dialog on the proper course of state doctrine. Instead of talking at cross-purposes, proponents of different views on search-and-seizure doctrine might at least find themselves speaking a substantially similar language.

244. *People v. Galvado*, 103 P.3d 923, 927 (Colo. 2005).

